TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 238

LIBERTY NATIONAL BANK OF ROANOKE, VIRGINIA, PETITIONER,

vs.

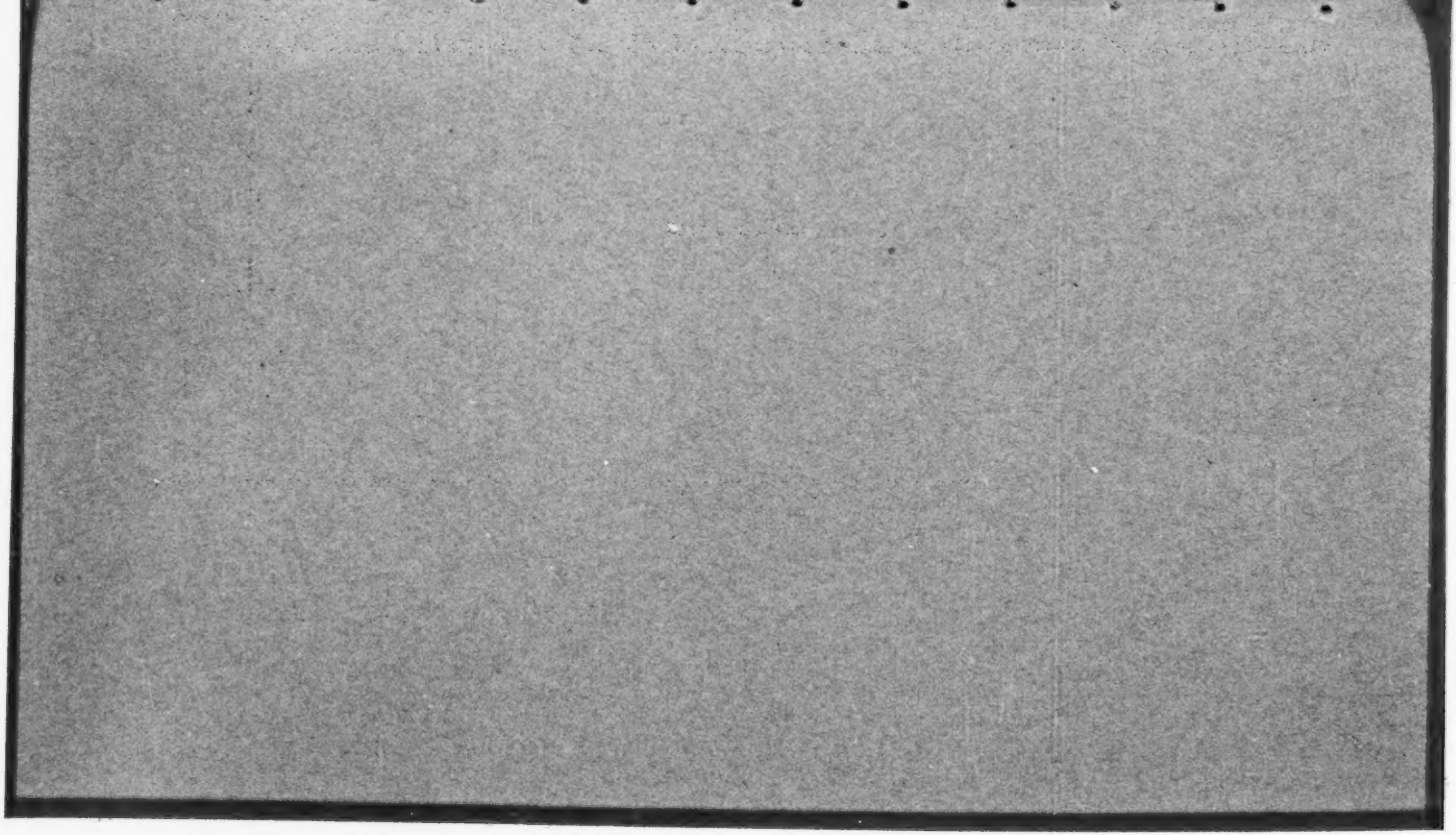
JAMES A. BEAR, TRUSTEE IN BANKRUPTCY OF THE ESTATES OF W. L. BECKER, SR., AND W. L. BECKER, JR., PARTNERS, ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 3, 1923

CERTIORARI AND RETURN FILED JUNE 2, 1923

(29,439)



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[fol.1] **UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT**

No. 2011

In Bankruptcy

JAMES A. BEAR, Trustee in Bankruptcy of the Estates of W. L. Becker, Sr., and W. L. Becker, Jr., Partners Trading as W. L. Becker & Company and as the Roanoke Provision Company, and Trustee in Bankruptcy of the Individual Estates of W. L. Becker, Sr., and W. L. Becker, Jr., Bankrupts, Petitioner,

versus

THE LIBERTY NATIONAL BANK OF ROANOKE, VIRGINIA, a Corporation, Respondent.

On Petition to Superintend and Revise, in Matter of Law, Proceedings of the District Court of the United States for the Western District of Virginia, at Roanoke.

PETITION TO SUPERINTEND AND REVISE, ETC.—Filed May 31, 1922

To the Honorable the Judges of the Circuit Court of Appeals of the Fourth Circuit of the United States:

Your petitioner respectfully shows:

(1) That he was duly elected and qualified as Trustee in Bankruptcy of the estate of W. L. Becker, Sr., and W. L. Becker, Jr., [fol. 2] partners trading as W. L. Becker & Company and as the Roanoke Provision Company, and was duly elected and qualified as Trustee of the estates of W. L. Becker, Sr., and W. L. Becker, Jr., as individuals, Bankrupts.

(2) That heretofore, to-wit, on August 6th, 1920, Runkle & Company, a Corporation, et al., filed their petition in the Clerk's Office of the United States District Court for the Western District of Virginia, at Roanoke, Virginia, alleging that W. L. Becker, Sr., and W. L. Becker, Jr., a partnership trading both as W. L. Becker & Company and as the Roanoke Provision Company, had committed an act of bankruptcy by the execution of a deed of assignment for the benefit of their creditors. On August 7th, 1920, W. L. Becker, Sr., and W. L. Becker, Jr., filed in the Clerk's Office of said Court, at Roanoke, Virginia, their joint answer to this petition, in which they appeared, waived issuance of service of process and admitted the allegations of said petition to be true and correct. On August 7th, 1920, a Receiver was appointed for certain of the bankrupt's property, and on August 20th, 1920, W. L. Becker, Sr., and W. L. Becker, Jr., partners trading as aforesaid, were adjudged bankrupts and the

case referred to R. Q. Mosby, Referee at Roanoke, Virginia, and said bankrupts directed to appear before him on August 21st, 1920. On August 23rd, 1920, R. Q. Mosby, then Referee, entered an order, reciting the adjudication of bankruptcy and directed W. L. Becker, Sr., and W. L. Becker, Jr., to file in triplicate in the Clerk's Office of said Court on or before the 2nd day of September, 1920, a complete list of their creditors, together with the amount due each of them, and a complete list of their partnership assets, describing the same fully, and further ordered that both W. L. Becker, Sr., and W. L. Becker, Jr., should file with the Referee on or before the aforesaid date a schedule of their respective individual creditors and a list of their individual assets, and should likewise file such similar schedules of assets and liabilities in triplicate in said Clerk's Office. On August 30th, 1920, the said bankrupts complied with this order of the Referee and filed such lists of both their partnership assets and liabilities, as well as their individual assets and liabilities.

[fol. 3] (3) That thereafter, to-wit, on September 11th, 1920, the first meeting of the creditors was held and adjourned to September 25th, 1920, on which date the partnership offered to their creditors a composition. Various meetings of the creditors were held in reference to this composition from time to time until November 29th, 1920, on which date W. L. Becker, Sr., and W. L. Becker, Jr., filed an amended offer of composition, and on December 2nd, 1920, filed a petition asking for the confirmation of said order. Another creditors' meeting was held on December 23rd, 1920, at which a majority in amount and number of the creditors voted in favor of the composition, and at this meeting the Liberty National Bank of Roanoke, Virginia, filed a straight proof of claim, alleging that W. L. Becker, Sr., and W. L. Becker, Jr., partners trading as the Roanoke Provision Company were indebted to it in the sum of $5,566.99, with interest*est* and attorneys' fees, as set out in said proof, which alleged that the said Bank had received no security for this debt.

(4) In the meantime meetings of the partnership creditors had been held from time to time and the Referee had certified to the United States District Court for the Western District of Virginia, his report on the amended offer of composition, together with the evidence taken thereon. This report of the Referee was filed on December 28th, 1920, and on the same day the Liberty National Bank filed its objection to the confirmation of the composition offer, alleging that such confirmation would not be to the best interests of the individual creditors of the Beckers, nor for the best interests for such of the creditors of the bankrupts whose debts were likewise against the individuals composing the partnership. This proof filed at this time further alleged that the Bank's debt had been reduced to judgment against both the partnership and the individuals composing the partnership. That since petitions in bankruptcy had not been filed against either of the individuals and that they had not been adjudged bankrupts, and the judgment being over four months old, they were entitled to priority in the distribution of the estates of the

individuals and that such judgment was claimed to be a lien on both the real and personal and homestead property of the individuals. [fol. 4] This objection to the confirmation of the composition is the first pleading appearing in the record by which the Liberty National Bank claims that it is entitled to priority, as the actual proof asserting such priority was not filed until January 6th, 1921. In fact, never until the filing of this objection to the composition did counsel for the respondent bank intimate that he expected to claim a lien on the property of the individuals by reason of the fact that the judgment which he had obtained against both the partnership and the individuals had reached the age of four months. It is a fact that on the 12th day of October, 1920, at a creditors' meeting held on that date, counsel for the respondent bank did state that he objected to the offer of composition and repeated and reiterated this objection at numerous times during proceedings held on that day, stating in each of these objections that he objected to the composition for the reason that in order to make it effective it would be necessary to mortgage the individual properties, in order to secure the money with which to pay the composition offer. But at none of these meetings did counsel for respondent bank advise the other counsel present that he expected to claim that his judgment was a lien on the estates of the individuals composing the partnership.

(5) On January 6th, 1921, respondent bank filed its proof of debt against W. L. Becker, Sr., and W. L. Becker, Jr., partners trading as the Roanoke Provision Company, alleging that the consideration was for money advanced to W. L. Becker, Sr., and W. L. Becker, Jr., that the same was evidenced by the joint note of the Roanoke Provision Company and W. L. Becker and also endorsed individually and personally by W. L. Becker, Sr., and W. L. Becker, Jr. That the said claim evidenced by said note had been reduced to judgment at the July, 1920, term of the Corporation Court for the City of Roanoke, against W. L. Becker, Sr., and W. L. Becker, Jr., partners trading as the Roanoke Provision Company, and also against both W. L. Becker, Sr., and W. L. Becker, Jr., individually, they having been sued both as individuals and as partners. Said Bank further claimed that execution was issued upon this judgment and that the said judgment, as well as said execution, were liens upon [fol. 5] all property of both of the Beckers; that four months had now elapsed since said judgment was docketed against the real estate of these individuals and that not having been adjudged bankrupts on any petition filed against them, or in the administration of either estate; that the said judgment was a secured claim and it was entitled to priority in the distribution of the estate. On January 10th, 1921, the bankrupt partnership filed its petition, asking for a confirmation of the amended offer of composition.

(6) During this lapse of time both the original and amended offer of composition had been certified by the Referees to the Judge of the United States District Court for the Western District of Virginia, and having been adjourned from time to time, the hearing was had

on the two offers of composition and objection to the confirmation thereof by the respondent bank, at which hearing the District Court held that the objection to these offers of composition made by respondent bank was well made and, therefore, entered an order declining to confirm the composition and directing that the money which had been deposited with the Court be refunded and that the deed of trust liens given on the individual properties be released.

(7) On April 27th, 1921, the said W. L. Becker, Sr., and W. L. Becker, Jr., filed their voluntary petitions in bankruptcy in the United States District Court for the Western District of Virginia, with the requisite schedules, and on April 28th, 1921, they were both adjudged voluntary bankrupts.

(8) On May 6th, 1921, your petitioner was appointed and qualified as Trustee as aforesaid and proceeded with the administration of both partnership and individual estates.

(9) On May 31st, 1921, respondent bank filed its separate proof of claim against W. L. Becker, Sr., and W. L. Becker, Jr., alleging practically the same facts that were alleged in the objection to the offer of composition filed on January 3rd, 1921, and in the proof of claim filed on January 6th, 1921, against the partnership. These last mentioned proofs of claims are practically counterparts of each other, [fol. 6]and after setting out the debts, the rendition of the judgment, the issuance of execution thereon and delivery to the proper State officer, alleged that the partnership having been adjudged a bankrupt on August 20th, 1920, but the individual bankrupts composing the partnership not having been so adjudged until April 28th, 1921, that respondent bank was, by virtue of the docketing of said judgment and issuance of execution thereon, entitled to assert a prior or secured claim against the individual property of both W. L. Becker and W. L. Becker, Jr. These proofs further allege that notwithstanding the fact that a Receiver was appointed to take charge of certain property of the partnership, he secured no dominion or control over the individual property of the bankrupts, but that such property had remained in the possession of the individual bankrupts.

(10) That thereafter, to-wit, on August 15th, 1921, your petitioner, Trustee as aforesaid, sold the two residences owned by said individuals, as well as certain other real estate which they owned and such remaining property of the partnership as was then in his hands, said sales being made free of liens and the proceeds of which sales are now in the hands of your petitioner as Trustee, subject to the order of the bankruptcy court.

(11) That the proceeds of sale of the property of the bankrupt partnerships are not sufficient to pay their creditors, nor are the proceeds of sale of the property of the individuals sufficient to pay their creditors.

(12) That thereafter, to-wit, on December 1st, 1921, your petitioner filed before A. P. Staples, Esquire, then sitting as Special Referee, his objections to the allowance of the claim of respondent

bank as a secured or priority claim, asserting that said Bank was only entitled to a ratable distribution with the other partnership and individual creditors, and denying that its judgment was a valid lien against the properties of either the partnerships or individuals.

(13) That thereafter, to-wit, on December 9th, 1921, the matter [fol. 7] being heard upon the said claims filed by the respondent bank and the objections thereto by your petitioner, said Special Referee, A. P. Staples, Esquire, entered an order sustaining the objections of your petitioner and disallowed the claims of respondent bank as secured claims, but ordered that they be allowed as unsecured claims against the estates of W. L. Becker, Sr., and W. L. Becker, Jr., and the Roanoke Provision Company.

(14) That thereafter, to-wit, on March 7th, 1922, respondent bank filed before said Special Referee his petition for review and petition for appeal, which, together with a summary of the evidence in the matter, the opinion of the said Referee and the assignment of error of said respondent bank, were forwarded to the Judge of the United States District Court for the Western District of Virginia, who, on May 23rd, 1922, entered an order stating that for reasons set out in the opinion of said court likewise filed on May 23rd, the order of the said Special Referee dated December 9th, 1921, is reversed and that the cause was remanded for further proceedings in consonance with the opinion of the court.

(15) That said order of the District Court reversing said order of said Special Referee, A. P. Staples, Esquire, dated December 9th, 1921, is erroneous in matter of law, in that:

First. The District Court of the United States for the Western District of Virginia erred in reversing by its said order the said order of the Referee dated December 9th, 1921, adjudging and decreeing that the lien of the judgment of the Liberty National Bank was invalid as a secured or priority claim on the funds in the hands of your petitioner, but adjudging and decreeing that said claim should be allowed as an unsecured claim against the estates of W. L. Becker, Sr., and W. L. Becker, Jr., and the Roanoke Provision Company, which said order of said Referee sustained the objection of your petitioner as to the allowance of said claim as a secured or priority claim. The said District Court, by reversing the said order of the Referee and upholding the alleged lien of the Liberty National Bank, which was in error for the reason that on August 20th, 1920, [fol. 8] the firms of W. L. Becker & Company, and the Roanoke Provision Company, composed of W. L. Becker, Sr., and W. L. Becker, Jr., were adjudged bankrupts and by virtue of the filing of said petition and said adjudication, and further proceedings had in said matter before the Bankruptcy Court and the Referees thereof, and especially the filing by the said W. L. Becker, Sr., and W. L. Becker, Jr., of lists of their assets and liabilities in compliance with an order of the Referee, all of the property of W. L. Becker, Sr., and W. L. Becker, Jr., then became and was as of the date of the filing of the petition in bankruptcy of Runkle & Company, to-wit, August

6th, 1920, within and under the jurisdiction of the United States District Court for the Western District of Virginia, and became and was subject to administration in accordance with the Acts of Congress relating to bankruptcy under and by virtue of which acts no liens could be acquired and perfected on said individual properties, or the proceeds of sale thereof, which would be entitled to priority, or which could be proven as secured claims.

Second. The District Court of the United States for the Western District of Virginia erred in reversing the said order of the Referee dated December 9th, 1921, and thereby upholding the alleged lien of the Liberty National Bank, for the reason that by virtue of the appointment and qualification of your petitioner as Trustee of both partnership and individual estates, title to all of the property of both partnership and individual estates thereby became and was vested in your petitioner as Trustee, whose title thereto related back to the dates of the filing of said petition of Runkle & Company, to-wit, on August 6th, 1920, and no liens could be acquired or perfected thereon which would disturb or render inoperative the provisions of the Act of Congress relating to Bankruptcy and the administration of estates in bankruptcy. The effect of the said order of said District Court is to allow a lien to be perfected on the property of the bankrupts after said property became subject to the jurisdiction of the bankruptcy court.

Third. The District Court of the United States for the Western District of Virginia erred in reversing the said order of the Referee [fol. 9] dated December 9th, 1921, and thereby upholding as a lien the alleged judgment of the Liberty National Bank of Roanoke, Virginia, for the reason that said judgment had not been recovered four (4) months prior to the filing of the petition of Runkle & Company, to-wit, August 6th, 1920, and four (4) months prior to the said order of Referee, R. Q. Mosby, entered August 23rd, 1920, and that said judgment only became four months old prior to the filing of the individual voluntary petitions of W. L. Becker, Sr., and W. L. Becker, Jr., to-wit, April 27th, 1921, because litigation was pending in said District Court over the offer of composition filed in the cause, and that respondent bank is now attempting to take advavantage of the time consumed with litigation pending over said offer of composition.

Wherefore, your petitioner, feeling aggrieved because of the said order of the said District Court entered May 23rd, 1922, asks that the same may be revised in matter of law by your Honorable Court, as provided in Section 24-B of the Bankruptcy Law of 1898 and the rules and practices in such case made and provided.

James A. Bear, Trustee of the Estates of W. L. Becker, Sr., and W. L. Becker, Jr., Partners Trading as W. L. Becker & Company and the Roanoke Provision Company, and of the Individual Estates of W. L. Becker, Sr., and W. L. Becker, Jr.

STATE OF VIRGINIA,
City of Roanoke, To wit:

I, James A. Bear, Trustee of the Estates of W. L. Becker, Sr., and W. L. Becker, Jr., partners trading as W. L. Becker & Company and the Roanoke Provision Company, and of the individual estates of W. L. Becker, Sr., and W. L. Becker, Jr., the Petitioner named and described in the foregoing petition, do hereby make solemn oath that the statements of fact contained therein are true and correct to the best of my knowledge, information and belief.

James A. Bear, Trustees as Aforesaid.

[fol. 10] Subscribed and worn to before me this 30th day of May, 1922. Bessie W. Watkins, Notary Public. Jas. A. Bear, Hall, Wingfield & Apperson, Attorneys.

May 31, 1922. Appearance of Harvey B. Apperson is entered for the petitioner.

UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

No. 2011

In Bankruptcy

[Title omitted]

NOTICE TO RESPONDENT TO DEMUR, ANSWER OR MOVE TO DISMISS

Issued May 31, 1922

On the Petition to Superintend and Revise, in Matter of Law, Proceedings of the District Court of the United States for the Western District of Virginia, at Roanoke

[fol. 11] To the Liberty National Bank of Roanoke, Virginia, a corporation, respondent:

Take Notice:

That you are required to demur, anwer or move to dismiss the petition to superiniend and revise, filed in this office in the above entitled cause on May 31, 1922, within fifteen days from this date, as required by Rule 36 of this Court.

May 31, 1922.

Claude M. Dean, Clerk U. S. Circuit Court of Appeals, Fourth Circuit.

Memorandum

A certified copy of the petition to superintend and revise, together with the original of the above notice annexed, were mailed to Jas.

D. Johnston, Esq., Roanoke, Virginia, Solicitor for Respondent on May 31, 1922.

Claude M. Dean, Clerk U. S. Circuit Court of Appeals, Fourth Circuit.

June 5, 1922, appearance of Jas. D. Johnston is entered for the respondent.

IN THE U. S. CIRCUIT COURT OF APPEALS

MOTION TO DISMISS PETITION TO SUPERINTEND AND REVISE—Filed June 10, 1922

Now comes the Liberty National Bank of Roanoke, Virginia, a corporation, the Respondent in the above entitled matter, and moves the court to dismiss the Petition to Superintend and Revise.

(1) Because no one of the errors complained of in said petition constitutes any ground to review and revise the decision of the District Court of the United States for the Western District of Virginia.

[fol. 12] (2) Because there is no error in the opinion of said District Court and no error in the order based on said opinion.

(3) Because Petitioner bases all his objections on the theory that the District Court of The United States for the Western District of Virginia, erred in not holding that the bankruptcy of the partnership dissolved the judgment recovered against the individual partners in their individual capacity. Respondent denies that the bankruptcy of the partnership, which is a separate entity, dissolved its judgment against the individuals, and says that its judgment against the individuals was more than four months old when said individuals were adjudged bankrupts.

(4) Because no proper or legal proceedings have been taken or had to avoid or discharge the lien of Respondent's judgment against said W. L. Becker, Sr., and W. L. Becker, Jr., individually. The objections filed by Petitioner against the allowance of Respondent's judgment as a secured debt do not allege that either W. L. Becker, Sr., or W. L. Becker, Jr., was insolvent at the time said judgment was recovered.

The Petition to Superintend and Review nowhere alleges that either W. L. Becker, Sr., or W. L. Becker, Jr., was insolvent at the time said judgment was recovered.

Nowhere in the proceedings is it alleged that W. L. Becker, Sr., and W. L. Becker, Jr., were insolvent at the time said judgment was recovered.

Respondent says that it is absolutely essential that Petitioner allege and prove by satisfactory evidence that W. L. Becker, Sr., and W. L. Becker, Jr., were insolvent at the time the lien of Respondent's judgment attached. Respondent says that Petitioner has neither alleged nor proven insolvency.

(5) Because "the order of adjudication of August 20th, 1920, declares the partnership to be a bankrupt, and distinctly failed to declare the individuals composing the partnership to be bankrupts," was not appealed from. "The refusal to adjudge the individuals composing the firm to be bankrupts was, if erroneous, an error which had to be appealed from within ten days from August the 20th, [fol. 13] 1920," and no appeal was taken.

Liberty National Bank of Roanoke, Virginia, By Jas. D. Johnston, Attorney.

STATE OF VIRGINIA,
City of Roanoke, To wit:

I, M. N. Ronald, a Notary Public in and for the City and State aforesaid, do certify that L. R. Tucker has this day personally appeared before me in my city and State aforesaid and made oath that he is cashier of the Liberty National Bank of Roanoke, Virginia, and the matters and things set forth in the foregoing motion to dismiss are true to the best of his knowledge and belief.

My commission expires on the 10th day of March, 1925.

Given under my hand this the 9th day of June, 1922.

M. N. Ronald, Notary Public.

IN U. S. CIRCUIT COURT OF APPEALS

DEMURRER TO PETITION TO SUPERINTEND AND REVISE—Filed June 14, 1922

The said Respondent says that the Petition to Superintend and Revise, is not sufficient in law, and for all that is stated in said Petition, the order of the District Court is clearly right. The grounds of demurrer relied on are as follows:

(1) Petitioner assigns as the first error that the District Court of the United States for the Western District of Virginia erred in not holding that the bankruptcy of the partnership ipso facto rendered null and void Respondent's judgment against W. L. Becker, Sr., and W. L. Becker, Jr., individually.

Respondent says that the partnership of W. L. Becker & Co., and the Roanoke Provision Co., were separate entities, and that said part- [fol. 14] nerships were so adjudged to be bankrupt as separate entities, and that the adjudication of these partnerships did not dissolve, nor render null and void Respondent's judgment against the individuals. Nor did the filing of the schedules of the individual assets affect Respondent's judgment.

Respondent says that its judgment against W. L. Becker, Sr., and W. L. Becker, Jr., individually was more than four months old when said parties were individually adjudged to be bankrupt.

(2) Respondent says that the Petitioner has neither averred nor proven that W. L. Becker, Sr., and W. L. Becker, Jr., individually was insolvent at the time the lien of its judgment attached, and that it is essential that Petitioner both allege and prove the insolvency of these parties individually, at the time the judgment attached.

(3) Respondent says that its judgment being against W. L. Becker, Sr., and W. L. Becker, Jr., individually could only be dissolved, or rendered null and void, by these parties being adjudged bankrupts individually within four months from the time the lien of said judgment attached against them individually, and then, only where it was alleged and proven that they were insolvent individually. Not all judgments recovered within even four months are dissolved or rendered null and void by bankruptcy, but only such as are alleged and proven to have been recovered when the party was either insolvent, or the party or parties to be benefited thereby had reasonable cause to believe the defendant was insolvent and in contemplation of bankruptcy.

None of the essentials for the dissolution of Respondent's judgment exist here.

(4) Respondent says that the petition to have the partnerships of W. L. Becker & Co., and the Roanoke Provision Co., adjudged bankrupts contained a prayer that both the partnerships and the individuals be adjudged bankrupts, but the order entered on said petition by the Judge of the District Court, distinctly failed and refused to adjudicate the individuals to be bankrupts.

Petitioner having failed to appeal from such order within ten [fols. 15 & 16] days cannot now be heard to complain. If Petitioner invokes the aid of said order for his purposes he will not be allowed to extend its operation beyond the limitations fixed thereon by the Judge of the District Court.

Wherefore this Respondent submits that its demurrer should be sustained and that the order of the District Court complained of in the Petition herein should be affirmed.

The Liberty National Bank of Roanoke, Va., By Jas. D. Johnston, Attorney.

STATE OF VIRGINIA,
City of Roanoke, To wit:

I, M. N. Ronald, a Notary Public in and for the City and State aforesaid, do hereby certify that Jas. D. Johnston, counsel for the Liberty National Bank of Roanoke, Virginia, has this day personally appeared before me in my city aforesaid and made oath that the foregoing demurrer is well founded in law, and I hereby certify that L. R. Tucker, cashier of said bank, has personally appeared before me in my city aforesaid and made oath that said demurrer is not interposed for delay.

My commission expires on the 10th day of March, 1925.

Given under my hand this the 13th day of June, 1922.

M. N. Ronald, Notary Public.

June 22, 1922, twenty-five copies of the printed record are filed.

[fol. 16a] IN U. S. CIRCUIT COURT OF APPEALS

STIPULATION AS TO ADDENDUM TO RECORD—Filed July 10, 1922.

It is hereby stipulated and agreed between counsel that, it appearing that page 30, paragraph 7, of the printed record in this case refers to certain lists of the individual assets and liabilities of W. L. Becker, Sr., and W. L. Becker, Jr., as being filed with the said printed record as exhibits therewith, but as a matter of fact, through inadvertence, said lists of individual assets and liabilities were not printed with the record, that said lists show:

(1) That in said list W. L. Becker, Sr., valued his individual assets at $23,500.00.

(2) That in said list W. L. Becker, Sr., scheduled the debts for which he alone was personally liable, some of which debts were secured by deeds of trust and some of which were not, at $5,372.25.

(3) That W. L. Becker, Sr., scheduled the debts for which he was liable, along with other makers and endorsers, a portion of which were secured by liens on the property owned by him and other parties, $3,900.00.

(4) That W. L. Becker, Sr., scheduled the debts of the partnerships of W. L. Becker & Company and the Roanoke Provision Company on which he was personally an endorser, at $27,066.05.

(5) That in said list W. L. Becker, Jr., valued his individual assets at $15,100.00.

(6) That in said list W. L. Becker, Jr., scheduled the debts for which he alone was personally liable, some of which debts were secured by deeds of trust and some of which were not, at $6,527.85.

(7) That W. L. Becker, Jr., scheduled the debts for which he was liable, along with other makers and endorsers, a portion of which were secured by liens on the property owned by him and other parties, at $3,900.00.

[fol. 16b] (8) That W. L. Becker, Jr., scheduled the debts of the partnerships of W. L. Becker & Company and the Roanoke Provision Company on which he was personally an endorser, at $27,066.05.

It is further stipulated and agreed between counsel that the sale of the entire assets of the partnership brought the sum of $908.08, which was the entire amount received from the sale of said assets; that the sale of the entire individual assets of W. L. Becker, Sr., brought the sum of $11,786.00, from which mortgage indebtedness of $2,708.36 was paid; and that the sale of the entire individual assets of W. L. Becker, Jr., brought the sum of $8,832.00, from which mortgage indebtedness of $3,257.68 was paid. And it is further stipulated between counsel that this stipulation shall be printed and considered as an addendum to the record in this cause,

both on the case to superintend and revise in matter of law and on the appeal.

Harvey B. Apperson, Attorney for Petitioner and Appellant.
Jas. D. Johnston, Attorney for Respondent and Appellee.

[fol. 16c] October 26, 1922, appearance of Jas. A. Bear is entered for the petitioner.

In U. S. Circuit Court of Appeals

Argument of Cause

November 17, 1922 (November Term, 1922), cause came on to be heard, together with No. 2016, before Woods and Waddill, Circuit Judges, and Rose, District Judge, and is argued by counsel and submitted.

United States Circuit Court of Appeals, Fourth Circuit

Filed December 21, 1922

No. 2011

In Bankruptcy

On Petition to Superintend and Revise, in Matter of Law, Proceedings of the District Court of the United States for the Western District of Virginia, at Roanoke.

[Title omitted]

Opinion

[fol. 16d] (Argued November 17, 1922; Decided December 21, 1922)

Before Woods and Waddill, Circuit Judges, and Rose, District Judge

James A. Bear and Harvey B. Apperson (Hall, Wingfield & Apperson on brief) for Petitioner, and James D. Johnston for Respondent.

Woods, Circuit Judge:

The issue of allowing or rejecting claim of a lien on the bankrupt's property is reviewable by appeal and not by petition to superintend and revise. The petition must therefore be dismissed. Coder v. Arts, 213 U. S. 223; Matter of Loving, 224 U. S. 183.

Dismissed.

UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

No. 2011

[Title omitted]

[fol. 16e] On Petition to Superintend and Revise, in Matter of Law, Proceedings of the District Court of the United States for the Western District of Virginia

JUDGMENT—Filed and Entered December 22, 1922

This cause came on to be heard upon the petition and the motion of respondent to dismiss and the demurrer of respondent, and upon the transcript of record of the proceedings of the said District Court in the matter brought up for review, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the petition to Superintend and Revise, in this cause be, and the same is hereby, dismissed with costs.

It is further ordered that the Clerk of this Court transmit a certified copy of this judgment to the said District Court.

C. A. Woods, U. S. Circuit Judge. December 22, 1922.

IN U. S. CIRCUIT COURT OF APPEALS

PETITION OF RESPONDENT FOR STAY OF MANDATE—Filed January 13, 1923

The Respondent, by its counsel, James D. Johnston, Esq., represents unto the Court that it is its intention to apply to the Supreme Court of the United States for a writ of certiorari to this Court in the above entitled cause, and respectfully asks that the issuance of the mandate of this Court in the above case be stayed pending its application in the Supreme Court for said writ of certiorari.

Jas. D. Johnston, Counsel for Respondent. January 11th, 1923.

[fol. 16f] UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

No. 2011

[Title omitted]

On Petition to Superintend and Revise, in Matter of Law Proceedings of the District Court of the United States for the Western District of Virginia, at Roanoke

ORDER STAYING MANDATE—Filed January 13, 1923

Upon the application of the Respondent, by its counsel, James D. Johnston, Esq., and for good cause shown.

It is ordered that the issuance of the mandate of this Court in the above entitled cause be, and the same is hereby, stayed pending the Respondent's application in the Supreme Court of the United States for a writ of certiorari to this Court, provided said application is presented in the said Supreme Court within 30 days from January 22, 1923.

C. A. Woods, U. S. Circuit Judge. January 13, 1923.

[fol. 17] **Transcript of Record on Appeal—Filed June 9, 1922**

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA, AT ROANOKE, VIRGINIA

In Bankruptcy

[Title omitted]

STIPULATIONS OF COUNSEL AS TO RECORD—Filed June 7, 1922

It is hereby stipulated and agreed by counsel of record that the transcript of the record on petition for appeal, filed in the above proceedings, shall consist of the following:

(On Petition to Review and Revise in Matter of Law)

(1) Petition of James A. Bear, Trustee, etc., to review and revise in matter of law, which said petition contains the assignments of error filed therewith.

(2) Notice to respondent to demur, answer, or move to dismiss petition.

(3) Demurrer, answer, or motion to dismiss petition.

[fol. 18] (On the Petition for Appeal)

(4) Petition of James A. Bear, Trustee, etc., on appeal, which petition contains the assignments of error filed with the same.

(5) Order granting appeal.

(6) Citation.

(7) Order of Adjudication of W. L. Becker, Sr., and W. L. Becker, Jr., partners trading as W. L. Becker & Company and the Roanoke Provision Company, dated August 20th, 1920.

(7a) Order of referee, R. Q. Mosby, dated August 23, 1920.

(8) Proof of claim of the Liberty National Bank against W. L. Becker, Jr., filed May 31st, 1921.

(9) Specifications of objections of James A. Bear, Trustee, to the allowance as a secured claim of the debt of the Liberty National Bank of Roanoke, Virginia.

(10) Summary of evidence of Referee and evidence transmitted therewith, which was taken on January 23, 1921, provided that it is stipulated and agreed between counsel that Exhibits numbers 1, 2, 3, 5 and 6 shall not be copied, as the contents of those Exhibits shall be governed by a certain agreed statement of facts between counsel, which is made a part of the record.

(11) Agreed Statement of Facts and proceedings taken from the record in this proceeding.

(12) Opinion of Special Referee, A. P. Staples.

(13) Order of Special Referee, A. P. Staples, dated December 9th, 1921.

(14) Petition for Appeal of Liberty National Bank from Order of Referee.

[fol. 19] (15) Petition for Review of Liberty National Bank from Order of Referee.

(16) Assignments of Error of Liberty National Bank to Order of Referee.

(17) Opinion of District Court of May 23rd, 1922.

(18) Order of District Court of May 23rd, 1922.

(19) It is stipulated and agreed that the foregoing transcript of record shall constitute the record to be printed in the case on petition to review and revise in matter of law, and the record to be printed in the case on appeal, except items numbers 5, 6, and 9 of the record in the case on appeal, which shall not be printed.

(20) It is further stipulated and agreed that any portion of the record in the case on appeal may be used in the case on petition to review and revise in matter of law, and vice versa.

(21) It is further stipulated and agreed that the transcript of the record in this matter on appeal and on the petition to superintend and revise shall be printed in accordance with the provisions of Rule 23 of the United States Circuit Court of Appeals.

Harvey B. Apperson, Attorney for Petitioner and Appellant.
Jas. D. Johnston, Attorney for Respondent and Appellee.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA

In Bankruptcy

In the Matter of W. L. BECKER & COMPANY, Trading Also as Roanoke Provision Co., a Partnership Composed of W. L. Becker and W. L. Becker, Jr., Alleged Bankrupt

ORDER—ADJUDICATION AND REFERENCE OF W. L. BECKER & CO., &C., AUGUST 20, 1920

At Roanoke, in said District, on the 20 day of August, A. D., 1920, [fol. 20] before the Honorable Henry C. McDowell, Judge of said Court in Bankruptcy, the petition of Runkle Co., Inc., et al., that W. L. Becker & Company, trading also as Roanoke Provision Co., be adjudged a bankrupt, within the true intent and meaning of the Acts of Congress relating to Bankruptcy, having been heard and duly considered, the said W. L. Becker & Company, trading also as Roanoke Provision Co., a partnership composed of W. L. Becker and W. L. Becker, Jr., is hereby declared and adjudged bankrupt accordingly.

And whereas, the said W. L. Becker & Company, trading also as Roanoke Provision Co., of Roanoke, in the County of Roanoke, and District aforesaid, on the 20 day of August, A. D., 1920, was duly adjudged a bankrupt upon a petition filed in this Court against him on the 6 day of August, A. D., 1920, according to the provisions of the Acts of Congress relating to Bankruptcy.

It is Therefore Ordered, that said matter be referred to R. Q. Mosby, Esq., one of the referees in bankruptcy of this Court, to take such further proceedings therein as are required by said Acts; and the said W. L. Becker & Co., trading also as Roanoke Provision Co., shall attend before said referee on the 21 day of August, A. D., 1920, at Roanoke, Virginia, and thenceforth shall submit to such orders as may be made by said referee, or by this Court, relating to said W. L. Becker & Co., trading also as Roanoke Provision Co., Bankruptcy.

——— ———.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA

[Title omitted]

ORDER OF R. Q. MOSBY, REFEREE, OF AUGUST 23, 1920

At Roanoke, in said District, Before R. Q. Mosby, Referee in Bankruptcy, Sitting as a Court of Bankruptcy

[fol. 21] Whereas, the above-named partnership was adjudicated a bankrupt on the 20th day of August, 1920, on an involuntary petition filed by Runkle & Company, Inc., et al.; and,

Whereas, said matter has been referred to the undersigned for further proceedings:

It is ordered that the above-named bankrupt be, and it is hereby, required to file in triplicate in the United States Clerk's Office, at Roanoke, Virginia, on or before the 2nd day of September, 1920, a complete list of its creditors (along with their post office address, giving street number or post office box number), together with the amount due each creditor of said partnership, and also a complete list of its assets, the said schedule of assets to be described fully, giving the location of same, in order to facilitate the appraisers to be appointed in said matter in making their report to the undersigned:

It is further ordered that W. L. Becker and W. L. Becker, Jr., or any other party or parties interested directly or indirectly in said partnership, be, and they are hereby, required to file with the undersigned referee on or before the aforesaid date a schedule of their respective creditors (along with their post office address, giving street number or post office box number), and a list of their individual assets, said schedule of liabilities and assets also to be filed in the United States Clerk's Office in triplicate.

It is further ordered that a copy of this order be mailed to W. L. Becker & Company and W. L. Becker and W. L. Becker, Jr., or in lieu thereof, that service of said order may be accepted by Horace M. Fox, Esq., counsel for said bankrupt, and the individual members composing same.

Given under my hand this the 23rd day of August, 1920.

R. Q. Mosby, Referee in Bankruptcy. Leg.

[fol. 25] EVIDENCE: EXHIBIT WITH PROOF OF CLAIM

In the Clerk's Office of the Corporation for the City of Roanoke, the 20th Day of July, 1921

THE LIBERTY NATIONAL BANK OF ROANOKE, VA., Plaintiff,

against

W. L. BECKER, W. L BECKER, JR., Partners trading as Roanoke Provision Company, W. L. Becker and W. L. Becker, Jr., Defendant.

Judgment obtained in favor of the plaintiff against the defendant at the July term, 1920, of the Corporation Court for the said City, in the sum of $5,566.05, with interest on $5,150.00, a part thereof, from the 15th day of June, 1920, until paid $5.00 Attorney's Fee and 5% Collection fee on sum of $5,150.00 "Homestead Waived" until paid and the costs, to-wit: $14.39.

Docketed J. L. D. 7, page 161.

Abstract of judgment.

Teste: R. J. Watson, Clerk.

EVIDENCE: EXHIBIT WITH PROOF OF CLAIM

VIRGINIA:

AT A CORPORATION COURT CONTINUED AND HELD IN AND FOR THE CITY OF ROANOKE, IN THE STATE OF VIRGINIA, AT THE COURTHOUSE THEREOF, ON THE 30TH DAY OF JULY, 1920.

THE LIBERTY NATIONAL BANK

v.

ROANOKE PROVISION CO et als.

This day came the plaintiff, by its attorney, and it appearing to the Court that the defendants have had due notice of this motion as required by law, that the same was filed in the Clerk's office of this court within the time required by law, that the defendants, though solemnly called, came not and the plaintiff having proven its claim [fol. 26] to the satisfaction of the court, it is therefore, considered by the court that the plaintiff, The Liberty National Bank of Roanoke, Va., do have and recover of the defendants, W. L. Becker, W. L Becker, Jr., partners as Roanoke Provision Company and W. L. Becker and W. L. Becker, Jr., the sum of $5,566.05, with interest on $5,150.00, a part thereof, from the 15th day of June, 1920, until paid, $5.00 Attorney's Fee and 5% Collection Fee on the sum of $5,150.00, and all of its costs in this behalf expended, upon an instrument in writing waving the Homestead Exemption.

A Copy—Test: R. J. Watson, Clerk.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA

[Title omitted]

OBJECTIONS OF J. A. BEAR, TRUSTEE, TO ALLOWANCE AS SECURED CLAIM DEBT OF LIBERTY NATIONAL BANK—Filed before Referee on Dec. 1, 1921

Now comes James A. Bear, Trustee in Bankruptcy of W. L. Becker, Sr., and W. L. Becker, Jr., partners trading as W. L. Becker & Company, and the Roanoke Provision Company, and as Trustee of W. L. Becker, Sr., and W. L. Becker, Jr., and objects to the allowance of the claim of the Liberty National Bank, a Corporation, of Roanoke, Virginia, as a secured or priority claim against the estates of W. L. Becker, Sr., and W. L. Becker, Jr., and says that the said claim is not entitled to priority in the distribution of the proceeds of the sale of either of these estates, nor is said claimant entitled to assert said claim [fol. 27] as a prior or secured claim on the property of either W. L. Becker, Sr., or W. L. Becker, Jr., or the proceeds of the sale of the property of either of them, and for his grounds of objection assigns the following:

(1) On August 20th, 1920, on the petition of Runkle & Company, a Corporation, and others, which was filed on August 6th, 1920, against W. L. Becker, Sr., and W. L. Becker, Jr., partners trading as W. L. Becker & Company and the Roanoke Provision Company, the said W. L. Becker, Sr., and W. L. Becker, Jr., partners trading as aforesaid, were, by the United States District Court for the Western District of Virginia, adjudicated bankrupts, and by virtue of the filing of said petition and said adjudication in bankruptcy, and by virtue of all further proceedings had in said matter before said court and the Referees thereof, and especially by virtue of an order entered in said proceedings on August 20th, 1920, by the Honorable P. Q. Mosby, then sitting in said matter as Referee, and the filing by the said W. L. Becker, Sr., and W. L. Becker, Jr., of the lists of their assets and liabilities all the property of the said W. L. Becker, Sr., and W. L. Becker, Jr., then became and was, as of the date of the filing of the said petition of Runkle & Company, within and under the jurisdiction of the United States District Court for the Western District of Virginia, and became and was subject to administration in accordance with the Acts of Congress relating to bankruptcy, under and by virtue of which Acts no liens could be acquired and perfected on said individual property, or the proceeds of the sale thereof, which would be entitled to priority, or which could be proven as secured claims.

(2) That by virtue of the appointment and qualification of the undersigned as trustee of both the said partnership and individual estates, title to all of the property of both partnership and individual estates thereby became and was vested in the undersigned trustee,

who has title related back to the date of the filing of said petition of Runkle & Company, a Corporation, and others, and no liens could be acquired or perfected thereon which would disturb or render inoperative the provisions of the Acts of Congress relating to bankruptcy and the administration of estates in bankruptcy.

[fol. 28] (3) That the judgment of the Liberty National Bank of Roanoke, Virginia, a corporation, now claimed to be a valid lien, had not been recovered four months prior to the filing of the petition of Runkle & Company and the said order of August 23rd, 1920, as is required by the Acts of Congress relating to bankruptcy before the same could be enforced as a lien, and that the said judgment only became four months old prior to the filing of the voluntary petitions of said individuals, because litigation was pending in said court over the offer of composition filed in the cause, and that said Bank is now attempting to take advantage of the time consumed with litigation pending over said offer of compensation.

(4) The proof taken in these proceedings shows that the debt evidenced by the judgment claimed to be entitled to priority against said individual estates, was in truth and in fact a partnership debt and the proceds of the note on which the judgment was obtained were in fact used for partnership purposes and not for the purposes of the individuals.

James A. Bear, Trustee in Bankruptcy. James A. Bear, Hall, Wingfield & Apperson, Attorneys for the Trustee.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA

[Title omitted]

SUMMARY OF EVIDENCE

On Petition of the Liberty National Bank of Roanoke, Va., for an Appeal and a Review of an Order Entered by Hon. A. P. Staples, Special Referee

(1) On July the 20th, 1920, the Liberty National Bank of Roa-[fol. 29] noke, Virginia, a corporation, recovered judgment in the Corporation Court for the City of Roanoke, Virginia, against W. L. Becker, and W. L. Becker, Jr., partners trading as the Roanoke Provision Co., and also against W. L. Becker and W. L. Becker, Jr., individually. It was duly docketed according to the statutes of Virginia, on July the 31st, 1920, in the Clerk's Office of said Corporation Court in Judgment Lien Docket No. 7, page 161. The judgment was for $5,566.05, with interest on $5,150.00, a part thereof, from the 15th of June, 1920, $5.00 attorney's fee and five per cent collection fee on $5,150.00 and $14.39 costs. This judgment was recovered on a note which waived the homestead exemption

made jointly by W. L. Becker and the Roanoke Provision Company, and endorsed by W. L. Becker and W. L. Becker, Jr., The Roanoke Provision Company was a partnership composed of W. L. Becker and W. L. Becker Jr.

Process was served on the partners and also on them as individuals, and the judgment was taken against the partnership and also against W. L. Becker and W. L. Becker, Jr., individually. Execution was issued on this judgment and came into the hands of the Sergeant of the City of Roanoke, Va., at three o'clock p. m. on August the 10th, 1920;

(2) On August 6th, 1920, an involuntary petition was filed in the Clerk's Office of the United States District Court for the Western District of Virginia, at Roanoke, against the two partnerships of W. L. Becker & Company and the Roanoke Provision Company, both of said partnerships being composed of W. L. Becker, Sr., and Jr. The petition recited that an act of bankruptcy was committed August the 4th, 1920, by the execution by the partnerships of a general deed of assignment conveying all their property to a trustee for creditors, the petition alleging that said partnerships were insolvent.

(3) On August 7th, 1920, W. L. Becker, Sr., and Jr., filed in the Clerk's Office of said Court their joint answer to said petition, waived process and admitted the allegations of the petition.

(4) On August 7th, 1920, a receiver was appointed for the part-[fol. 30] nerships and directed to take possession of certain but not all of the partnership assets.

(5) On August the 20th, 1920, the partnerships aforesaid of W. L. Becker & Company and the Roanoke Provision Company, were adjudicated bankrupts and they were directed to appear before R. Q. Mosby, Referee, on April 21st, 1920.

(6) On August 23rd, 1920, R. Q. Mosby, Referee, entered an order reciting the adjudication in bankruptcy of the partnerships and directed that they file in the Clerk's Office on or before the 2nd day of September a complete list of their creditors, with the amounts due each creditor of said partnerships and a list of the partnership assets, and order that W. L. Becker, Sr., and Jr., should file with said referee on or before September 2nd, 1920, a schedule of their individual creditors and the amount due each, and a list of their individual assets, and should likewise file a similar schedule of such creditors and assets in triplicate in the Clerk's Office of said Court. Counsel for W. L. Becker, Sr., and Jr., accepted service of said order.

(7) On August the 30th, 1920, the partnership bankrupts filed in said Clerk's Office in triplicate a list of their assets and liabilities, and on August —, 1920, W. L. Becker, Sr., and Jr., filed in said Clerk's Office and in the office of the Referee in Bankruptcy lists of their individual creditors and individual assets, as was required by the above order of the referee, and copies are filed herewith marked as exhibits.

The schedules filed for the partnerships show that the claim of the Liberty National Bank was reduced to judgment and docketed in Judgment Lien Docket No. 7, page 161.

Also the individual schedules filed in the Clerk's Office and in the office of the Referee by W. L. Becker, Sr., and Jr., in August, 1920, show that the debt of the Liberty National Bank for $5,556.05 wah reduced to judgment;

(8) On September the 25th, 1920, at an adjourned meeting of the creditors, the partnerships offered to their creditors a composi- [fol. 31] tion, which was filed in the Referee's office on that day. This printed composition offer contained the following language, among other things:

"No petition for bankruptcy has been filed by or against such individuals and no discharge of such individual debts so listed as individual debts is sought; aside therefore, from the fact that this deed of trust securing the advancement of the money offered in this composition to the partnership creditors will be upon the security of the individual estate assets, the rights of the individual creditors are not herein sought to be, and will not be, affected by this composition, if confirmed."

A vote was taken October the 12th, 1920, and on October the 20th, 1920, the Referee certified to the Judge his report and the evidence.

The Judge of the District Court declined to consider the offer of composition because the bankrupts had not made the proper deposit to cover the offer of composition, and all papers were returned to the United States Clerk's Office at Roanoke;

(9) On November 27th, 1920, W. L. Becker and Virginia E., his wife, W. L. Becker, Jr., and Edith C., his wife, conveyed to C. E. Hunter and R. B. Adams, Trustees, all of their individual real estate or interest in real estate, this deed of trust reciting among other things the following:

"Whereas, the partnership of W. L. Becker & Co., and Roanoke Provision Co., composed of W. L. Becker, Sr., and W. L. Becker, Jr., have been adjudged bankrupts by the United States District Court for the Western District of Virginia; and,

Whereas, said partners have made an offer of composition to their partnership creditors, by which they agree to pay the costs of the said bankruptcy, the preferred claims in full, and a dividend of twenty per cent upon the unsecured claims; and,

Whereas, the Mountain Trust Bank has agreed to advance the amount of money necessary for said composition, not to exceed the sum of $12,500.00, the said amount to be payable only in the event [fol. 32] of, and upon the confirmation of said composition."

The above deed of trust was put on the individual real estate of W. L. Becker, Sr., and Jr., without the consent of the Bankruptcy Court and without any effort being made to obtain such consent;

but at the time the offer of composition was made, on the 25th day of September, 1920, at the meeting of the creditors held on that day before R. Q. Mosby, Referee, counsel for the bankrupts stated before the Referee and the assembled counsel present, that the money which was to be paid to the creditors under the composition, if accepted, was to be advanced by the Mountain Trust Bank and would be secured by a deed of trust on the individual properties of the bankrupts.

Copies of said offer of composition, the order, giving notice thereon, as well as an amended offer of composition made on the 29th day of November, 1920, together with the order issued thereon, are filed herewith marked Exhibits one and two, respectively.

(10) On December 2nd, 1920, the bankrupt partnerships filed a petition for a meeting of creditors to act upon said amended offer, and the creditors' meeting was held on December the 23rd, 1920, at which a majority in number and amount of the creditors vested in favor of the composition, but the Liberty National Bank renewed the objection, which it had made on October 12th, 1920, to the composition, upon the ground that individual real estate could not legally be mortgaged and the proceeds distributed among partnership creditors. The bank asserted by counsel that it had a claim against the partnerships, and also against the individuals, and that it was prejudicial to the rights of the individual creditors to have individual assets mortgaged with which to raise the composition offered to partnership creditors;

On January the 3rd, 1921, the bank filed its objections in writing to the confirmation of the composition and the record was certified by the Referee to the Judges, which is the first pleading in the record whereby the bank asserted priority against the individual estates.

(11) On January the 6th, 1921, said bank filed its proof of debt [fol. 33] against W. L. Becker, Sr., and W. L. Becker, Jr., partners as the Roanoke Provision Co. A copy of this proof is filed herewith as Exhibit 3.

On January the 10th, 1921, the two partnerships of W. L. Becker & Co., and the Roanoke Provision Co., both of these partnerships being composed of W. L. Becker and W. L. Becker, Jr., petitioned for the confirmation of the amended offer of composition;

(12) On January the 12th, 1921, the Judge of the Court entered and order, designating February the 3rd, 1921, as the time for hearing on the objections to the composition, and the hearing was postponed by the Judge from time to time until April the 20th, 1921. On this date the Court entered an order sustaining the objections, and rejecting the composition, reciting in the order that the matter has come on to be heard upon the offer of composition and objection thereto by the Liberty National Bank.

(13) On April 27th, 1921, W. L. Becker, Sr., and W. L. Becker, Jr., filed their voluntary petitions in bankruptcy with the Clerk of

the Court with the required schedules, and on April 28th, 1921, they were adjudged bankrupts individually;

(14) On May 16th, 1921, James A. Bear was elected trustee for the two partnerships by the partnership creditors, and elected trustee for W. L. Becker, Sr., and W. L. Becker, Jr., by the individual creditors. At this meeting counsel for the Liberty National Bank stated that he desired the record to show that he did not vote for the bank in the selection of a trustee on the ground that said debt was a preferred debt, and the order entered by the Special Referee so shows that the bank declined to vote in the selection of a trustee.

(15) On May the 31st, 1921, the Liberty National Bank filed its two separate proofs of debt. One against W. L. Becker, Sr., individually, and the other against W. L. Becker, Jr., individually, with separate copies of the judgment obtained against these parties ind-vidually attached to the respective proof of debt, and copies of the order of Court in which judgment was entered up against [fol. 34] said parties. Copies of these proofs of debt with exhibits are filed as Exhibits 4, 5 & 6;

(16) These proofs allege that the partnerships were adjudged bankrupt on August the 20th, 1920, but the individuals were not adjudged bankrupts until April 28th, 1921, and that the judgment against these parties individually was then more than four months old, and was entitled to priority in the payment of the individual assets of W. L. Becker, Sr., and W. L. Becker, Jr.

(17) On August the 15th, 1921, James A. Bear, Trustee, for said individuals, sold the two residences and other real estate of these parties at public auction. The residence of W. L. Becker, Sr., was bought by his wife, Virginia E. Becker, at $9,950.00, and the residence of W. L. Becker, Jr., was bought by his wife, Edith C. Becker, for $6,575.00. Out of the first named sum is to be paid the mortgage indebtedness of $2,708.36, and out of the second sum the mortgage indebtedness of $3,257.68;

These two sales were confirmed on August the 24th, 1921. These two bankrupts had lived with their families in these two valuable residences continuously, without paying a cent of rent, though the trustee had proceeded after his election, with the administration of both partnership and individual estates;

(18) The partnership assets will not be sufficient to pay the partnership creditors, and the individual assets will not be sufficient to pay the individual creditors, if there is included their personal endorsements on partnership indebtedness;

(19) During the proceedings before the Special Referee, certain evidence was taken with a view of proving that the money loaned by the Liberty National Bank was used for partnership purposes, which evidence is herewith transmitted, from which the Referee finds that all, or substantially all, of the money which was loaned upon the notes given the Liberty National Bank, upon which its judgment was

obtained, was expended and used for partnership purposes, and that very little, if any, of said money was used for the individual purposes of W. L. Becker, Senior, or W. L. Becker, Junior. No sepa- [fol. 35] rate accounts of W. L. Becker, Senior, were kept, but such money as he obtained was deposited in the partnership account at the various banks where the partnership kept its accounts.

Given under my hand this 20th day of March, 1922.
Abram P. Staples, Special Referee in Bankruptcy.

Depositions

In the District Court of the United States for the Western District of Virginia

[Title Omitted]

At Roanoke in said District, on the 3rd Day of January, 1921, Before A. P. Staples, Special Referee in Charge

Depositions of W. L. Becker and W. L. Becker, Jr., Taken by Consent of Counsel to be Read in the Above-styled Cause.

Appearances: Horace M. Fox, Esq., Attorney for bankrupts; Col. Jas. D. Johnston, Attorney for the Liberty National Bank; Mr. R. H. Wilis, Esq., and Robert B. Adams, Attorneys for Mountain Trust Bank.

W. L. Becker, having been first sworn, deposes and says:

At the request of Col. Johnston the witnesses were separated during the examination.

[fol. 36] By Mr. Fox:

(Q.) Mr. Becker, the Liberty National Bank, of Roanoke, filed a proof of debt, and with it a certified copy of a note which was originally for $17,150.00 said note being signed, first by the Roanoke Provision Company, and by W. L. Becker and payable to W. L. Becker and W. L. Becker, Jr., and endorsed by them. Did W. L. Becker, personally, or W. L. Becker, Jr., personally, ever have a line of credit at the Liberty National Bank?

(A.) I had a line of credit there, and kept a business account there.

(Q.) I mean, did you have a line of borrowing credit there?

(A.) Yes, sir.

(Q.) When this loan was made to the Roanoke Provision Company, in whose account did the proceeds go?

(A.) The Roanoke Provision Company's.

Exception by Col. Johnston: The records of the bank, and the bank book of Mr. Becker, or W. L. Becker & Company, or the Roanoke Provision Company, would be the best evidence as to whose credit this money was placed.

(Q.) By whom was the proceeds of this loan expended?
(A.) By the Roanoke Provision Company.

Exception by Col. Johnston: The check stubs and cancelled books would be the best evidence as to how this money was spent, and the witness is called upon to produce the same.

(Q.) State whether or not this money was spent for the purposes of the Roanoke Provision Company, or was any of it spent for the individual benefit of W. L. Becker or W. L. Becker, Jr.?
(A.) Only for the business of the Roanoke Provision Company, and not a dollar of it, so far as I know, was spent for my personal benefit, or W. L. Becker, Jr.'s.

Objection by Col. Johnston: Question objected to as leading and suggesting the desired answer to the witness.

(Q.) Mr. Becker, when J. B. Stringfellow was appointed Receiver in this cause, were there delivered to him all of the bank [fol. 37] records and check stubs called for by Col. Johnston?
(A.) They were, so far as I know.
(Q.) And since that time, Mr. Stringfellow has had charge of your place of business, the keys, etc., so far as you know?
(A.) Yes, sir.
(Q.) Is this the same J. B. Stringfellow who makes oath to this proof of debt, as President of the Liberty National Bank?
(A.) Yes, sir.

Counsel for Bankrupt states, that the bank ledgers, showing to whom the money derived from this loan was passed into possession of, are in the posession of Co. Johnston's client, and can be produced by him if desired.

(Q.) Mr. Becker, on the back of this check is, as shown of 5/1/20, a credit of $500.00; and at 6/24/20 a credit shown of $500.00. I will ask whether or not, on these dates, the Roanoke Provision Company paid to this bank these two payments?
(A.) Yes, sir.
(Q.) Had any execution been levied by any officer on any of your household goods?
(A.) No, sir.
(Q.) Mr. Becker, how old are you?
(A.) 66 years old the 11th day of last month.
(Q.) Are you married, and is your wife living?
(A.) Yes, sir.
(Q.) How old is she?
(A.) 30.
(Q.) Mr. Becker, there are listed in the schedule filed by the bankrupt company, and also a schedule filed by you personally, a

number of notes. I will ask you to state whether or not all of these notes are on the regular bank forms, and also contain a waiver of homestead exemption?

(A.) Yes, sir.

Counsel of Liberty National Bank moves the Court to exclude all the foregoing questions and answers as being illegal and irrelevant and not waiving said exception, proceeds to cross examine the witness:

Cross-examination:

By Col. Johnston:

(Q.) Mr. Becker, who kept the books of the firm of W. L. Becker [fol. 38] & Company and the Roanoke Provision Company.

(A.) My son had charge of them.

(Q.) Who looked after the discounting of the papers of the firm, and the drawing of the checks?

(A.) My son drew most of the checks. I looked after the securing of the loans.

(Q.) What income did you have, aside from the business?

(A.) Did not have any, aside from my business, except rents from my property down here, which was later sold.

(Q.) When a note was discounted, who looked after the disbursing of the proceeds?

(A.) I did some of it myself, and so did my son.

(Q.) What salary did you allow yourself under the partnership business?

(A.) $150.00 per month.

(Q.) Was an account kept on the books of the partnership of yourself individually, and also of W. L. Becker, Jr., individually?

(A.) I think there was.

(Q.) Where is that account?

(A.) I don't know. Just a year or so ago we had a fire and lost every old record we had.

(Q.) What records were preserved from the fire?

(A.) Such books and business papers as we had in the safe.

(Q.) Would you kindly give a list of such to the stenographer?

(A.) No sir, I could not do that.

(Q.) Can you remember any of the books that were reserved from the fire?

(A.) Yes, our merchandise ledger, and maybe such check books as were not fully used up.

(Q.) What of your books were destroyed by the fire?

(A.) I could not tell you every one, but our records for several years were destroyed wholly.

(Q.) What do you include under the term of "records?".

(A.) I include every record of the business transactions, except those books as were saved.

(Q.) Do you include cancelled checks, and check stubs, as being destroyed?

(A.) Yes, sir.

(Q.) Do you include the record of the individual account of yourself and W. L. Becker, Jr.?

(A.) Yes, to a certain date, but I could not tell exactly the date. I don't mean every check, but just in a general way.

Q. I believe you, and W. L. Becker, Jr., together own a one-half interest in the block #21 Lots, with two houses on two [fol. 39] of these lots, near the Silk Mills, don't you?

(A.) Yes, In Belmont Hill, not near the Silk Mills tho.

(Q.) Where did you get the money with which you bought and paid for these lots?

(A.) I could not answer that question fully, but I know a portion of it was borrowed of the Mountain Trust Bank, and the balance was paid for in general business.

(Q.) You owed the Liberty National Bank, at one time, about $26,000.00, I believe?

(A.) Yes, sir.

(Q.) And, you were paying out of this money borrowed from the Liberty National Bank, the various individual demands of you, and W. L. Becker, Jr.?

(A.) I never had individual demands to amount to anything.

(Q.) You, and W. L. Becker, Jr., held your interests in the lots, above referred to, individually, I believe?

(A.) Yes, they were in our names. The deed was made to W. L. Becker and W. L. Becker, Jr.

(Q.) And, you used part of the money you got from the Liberty National Bank to pay these individual demands from it?

(A.) No, I don't know that at all.

(Q.) You are not prepared to say that you did not use the money in that way?

(A.) No, sir, but it was a very small portion, if any at all, used. I could, of course, not say the exact amount.

(Q.) As a matter of fact, you took out of your business, and out of your money, wherever you had it, to pay the demands upon you—did you not?

(A.) Certainly.

(Q.) And, you were not undertaking to separate your funds, and say that some should go exclusively to pay one part, and some another?

(A.) To a certain extent I did.

(Q.) But you have no account showing where any distinction of that case was kept?

(A.) I don't know about that. If I could see the old check books I might tell. If you are driving at the fact that I used any of this money for my bersonal benefit, I did not do it.

(Q.) How much did W. L. Becker, Jr., pay on his residence?

(A.) That is his matter, for I don't know. He can answer that for himself.

(Q.) Have you no idea?

(A.) No, sir.

(Q.) Do you know where he got the money he paid on his residence?

(A.) No. I know where he got $1,500.00 of it, as I endorsed his note at the First National Bank for it. That is all I can tell you.

[fol. 40] (Q.) And, you say you have no individual income, or source of individual income, except from rents from property Won't you kindly give a list of all property from which you derive an individual income, and a list of any other securities from which you derive an individual income, since the date of your first indebtedness to the Liberty National Bank.

(A.) The only source of income, outside of my salary and the profits of W. L. Becker & Company, was rents from a building on Holliday Street.

(Q.) Mr. Becker, did you personally superintend the disbursement of all the money, or any part of it, and if so, what part of it, that you borrowed from the Liberty National Bank.

(A.) Not all of it, but a part of it.

(Q.) Will you kindly file with the Referee an account, showing the sums that you disbursed, and the dates, and to whom paid, out of this money derived from the several loans made you by the Liberty National Bank?

Objection by Mr. Fox: The witness has stated that all the records, bank books, and account books, of these two concerns were turned over last August to the Receiver in this cause. It is absolutely impossible for him to make up a list from papers which he does not have in his possession, but are in the possession of the Court.

Counsel for Bank replies that the Receiver is an officer of the United States Court, and the Special Referee is requested to enter an order, if necessary, directing the Receiver to allow the witness to inspect any, and all, books and papers as he may need in order to make up the statement requested.

(Q.) As a matter of fact, Mr. Becker, you don't know with any degree of accuracy, what was done with the $26,000.00 that was borrowed from the Liberty National Bank?

(A.) Yes, I know to this extent. So far as I am aware, none of this money was spent for the personal use of W. L. Becker.

(Q.) How can you know this, unless you are able to see to whom the money was paid?

(A.) Just like we know the sun is shining, and we can't see it. On that same principal.

[fol. 41] (Q.) Where did you get the money that you paid your salary, and W. L. Becker, Jr.'s, from?

(A.) From the profits of W. L. Becker & Co., and the Roanoke Provision Company profits.

(Q.) Do you mean to tell the Court that you drew no checks on the account of W. L. Becker & Company and the Roanoke Provision Company, at the Liberty National Bank, to pay the salaries of the firm?

(A.) I did not say that. I mean the principal part of it came from the two sources I mentioned.

(Q.) Where did you get the money that you paid on the lots above referred to, as being in Belmont?

(A.) As I stated awhile ago, I could not tell you where all this money came from, but so far as the bank was called on to pay the balance I don't know.

(Q.) You are not prepared to say that none of the money that went to pay on these lots came out of the account at the Liberty National Bank?

(A.) Not to my knowledge.

(Q.) Where did it come from then?

(A.) Some of it might have come out of it, but the bulk of it came from other sources.

(Q.) W. L. Becker, Jr., was also drawing on the firm account, at the Liberty National Bank to pay his salary, wasn't he?

(A.) I don't know about that.

(Q.) You are not prepared to say that he did not?

(A.) No, sir.

(Q.) You are not prepared to say that W. L. Becker, Jr., did not get, out of this fund, the money he paid on his residence?

(A.) My recollection about the transaction of his residence is this: That he paid $1,500.00, and assumed a loan on it, and that $1,500.00 was borrowed at the First National Bank, and I went on his note for it. There was a loan on it, held by Mr. Lambert at Bedford, which was afterwards transferred to the First National Bank, and I think the same loan is still on.

By Mr. Fox:

(Q.) Mr. Becker, you had, up to some time ago, owned a piece of property on Holiday Street?

(A.) Yes, sir.

(Q.) I believe you first obtained a loan on this property, and then sold it?

(A.) Yes, sir.

(Q.) State whether or not the proceeds of either this loan, or the [fol. 42] sale, went into the purchase of any other of this real estate of which you have acquired?

(A.) $9,000.00 from the sale of that property was paid to the Liberty National Bank; $10,000.00 was paid into the general business, and some of it into this Southeast property, I don't know what amount.

(Q.) Was the $9,000.00 credit, shown on this note as of 3/19/20, the proceeds of the sale of your personal individual property on Holiday Street?

(A.) Yes, sir.

(Q.) And, do I understand you also to state that the $10,000.00 derived from a loan on this Holiday Street property, was put into the partnership account, and used for partnership purposes, or any part thereof?

(A.) Yes, sir, a portion of it was. Some of the money, however, was paid to the Liberty National Bank to *curtain* the note, and the balance was placed to the credit of W. L. Becker & Co.

(Q.) Was the Liberty National Bank paid any part of the money you all received for your fire insurance?

(A.) I think every dollar of it was paid to the Liberty National Bank.

By A. P. Staples, Referee:

(Q.) Mr. Becker, were the moneys that you derived from the sale of your property, and other individual assets, paid into the general partnership funds?

(A.) Yes, either for W. L. Becker & Company or the Roanoke Provision Company.

(Q.) Were your partnership funds, and individual funds, more or less commingled in your partnership account?

(A.) They were, more or less.

(Q.) Do you think that the real estate, which you and your son have listed in your individual schedule, was indirectly acquired from the proceeds of your business?

(A.) Yes, sir.

By Col. Johnston:

(Q.) Your residence was purchased in what year?

(A.) The lot was bought in 1901, and the house built in 1902, as I remember.

(Q.) When did you make the loan from the Liberty National Bank first?

(A.) June, 1918, the Liberty National Bank was organized. It was soon after that.

[fol. 43] W. L. Becker, Jr., having been duly sworn, deposes and says:

By Mr. Fox:

(Q.) Mr. Becker, there are scheduled in the partnership schedule, and in your individual schedule, a number of notes. I wish you would state whether or not all of these notes were on the regular printed bank forms, and contain the usual provision of waiving the homestead?

(A.) Yes, sir.

(Q.) What is your age?

(A.) I am 34, and my wife is 32.

(Q.) Has any execution been levied by any officer on judgments, especially upon the judgment of the Liberty National Bank on your household properties?

(A.) No, sir.

(Q.) The Liberty National Bank filed and exhibited with its proof of debt, a note for $17,150.00, dated September 22nd, 1919, on which are shown a number of credits. Was this a renewal note of a

former indebtedness, and if so, when did the Roanoke Provision Company obtain a line of credit from the Liberty National Bank?

(A.) That was a renewal note, and a line of credit was gotten from the Liberty National Bank pretty soon after they went into business.

(Q.) Shortly after June, 1918?

(A.) Yes, sir.

(Q.) Do you recall what the amount of the original note was for?

(A.) I do not know.

(Q.) Was it more than the $17,150.00?

(A.) No, that is not the first note.

(Q.) Between the date of the first credit that you obtained from the bank, and the date of this note, had your indebtedness, at any time, been larger than this?

(A.) Yes, sir.

(Q.) To whom was this loan made?

(A.) To the Roanoke Provision Company.

(Q.) Mr. Becker, in what business, and for what purposes, were the proceeds for this loan used?

(A.) The proceeds of that note we used in the business, for the purpose of paying obligations of the Roanoke Provision Company.

(Q.) Was any of this money used for the personal individual [fol. 44] benefit of W. L. Becker or W. L. Becker, Jr.?

(A.) No, sir.

(Q.) You purchased a home sometime ago, do you remember the date?

(A.) 1914.

(Q.) Were any of the proceeds of the loan from the Liberty National Bank used for that home?

(A.) No, sir.

(Q.) You and your father purchased a one-half undivided interest, being a one-fourth interest each, in about twenty lots on Belmont Hill, and you purchased one lot individually. Do you recall about how long ago that was?

(A.) It was either 1915 or 1916.

(Q.) Did you and your father pay for those lots in full?

(A.) Yes, sir.

(Q.) Did the proceeds of this loan from the Liberty National Bank go into the purchase of these lots in Belmont Hill?

(A.) No, sir, I don't think so.

(Q.) Do you recall whether or not these lots had been first paid prior to June, 1918, when the Liberty National Bank was organized?

(A.) I can't recollect.

(Q.) It is material for the Court to know if, as a matter of fact, any of the proceeds of this loan went into these lots, and I will ask you to make an examination, as you can, of any of the existing records and report to the Referee what you find.

———.

(Q.) Did you have charge of the larger portion of the checking business for the Roanoke Provision Company, and the W. L. Becker & Company?

(A.) Yes, sir.
(Q.) You also had charge of the books?
(A.) Yes, sir.

By Col. Johnston (after making objections on page #14-A):

(Q.) Where are the cancelled checks, and check stubs, on the Liberty National Bank of W. L. Becker & Company and the Roanoke Provision Company?
(A.) I could not tell you. A good many were destroyed in the fire.
(Q.) What part of them were destroyed in the fire?
(A.) I am unable to say.
(Q.) Where are those that were not destroyed?
(A.) All that I know of are in the building at #375 Salem Ave.
(Q.) Did you keep an individual account for yourself and your father?
(A.) What do you mean?
[fol. 45] (Q.) Did you have, on the partnership books, an account for you and your father?

Counsel of Liberty National Bank moves the Court to exclude all the foregoing questions and answers as being illegal and irrelevant, and not waiving said exceptions, proceeded to cross examine the witness, as on page #14.

(A.) Yes, sir.
(Q.) Where is that record?
(A.) In the same building.
(Q.) How much did you get a month out of the partnership?
(A.) Had a drawing account of no specified amount each month.
(Q.) How much did you usually draw?
(A.) $200.00 or $250.00 per month.
(Q.) Did your father have a salary?
(A.) He worked it the same way.
(Q.) How much did he draw?
(A.) I would not attempt to say.
(Q.) What, according to your best recollections?
(A.) I think I have answered that question.
(Q.) Did you draw the checks to pay his salary?
(A.) — say about the same, altho I don't know.
(Q.) Did you draw the checks to pay his salary?
(A.) Not always.
(Q.) How frequently did you draw those checks?
(A.) I can't tell you.
(Q.) Can you recall the amount paid him at any time?
(A.) No, sir, I can not.
(Q.) What do you value your residence at?
(A.) I don't know what I could get for it if I had to sell it, but I think it is worth $10,000.00 now.
(Q.) Are there any mortgages against this property, and if so, how much?

(A.) There is one mortgage of $3,000.00 principal.
(Q.) What is the size of the lot on which your residence is built?
(A.) 60 feet wide, by 200 feet long.
(Q.) This lot is located on what street, and what part of Roanoke?
(A.) On Broadway, in South Roanoke.
(Q.) Could you file with the Referee a statement, showing the various sums borrowed from the Liberty National Bank, and how the [fol. 46] proceeds were disbursed?
(A.) I will make an effort to do so.
(Q.) What is your father's residence valued at?
(A.) I could not tell you.
(Q.) Do you know what mortgage indebtedness there is against it?
(A.) I am not positive, but I think it is $2,500.00.
(Q.) Is his residence worth more or less than your residence?
(A.) I can not say.
(Q.) You were asked by Mr. Fox whether any of the money borrowed from the Liberty National Bank went to pay for the Belmont lots. When did you make the last payments on these lots?
(A.) I am not positive.
(Q.) Did you make a payment on these lots in 1920?
(A.) Can't say.
(Q.) Who composed the partnership of W. L. Becker & Company?
(A.) W. L. Becker and W. L. Becker, Jr.
(Q.) Who composed the partnership of the Roanoke Provision Co.?
(A.) W. L. Becker and W. L. Becker, Jr.

By Mr. Fox:

(Q.) You filed a schedule of the personal liabilities, which you distinguished from the partnership liabilities, with the Referee, did you not?
(A.) Yes, sir.
(Q.) Have all of your individual creditors, listed as such on your individual schedule of liabilities, filed with the Referee in this case, executed a writing whereby they have consented to you giving a Deed of Trust on your individual real estate, along with your father on his individual real estate, to secure the $12,500.00 to the Mountain Trust Bank, which sum is the amount offered in payment of the composition in this cause, except from this cause, however, the First National Bank?
(A.) Yes, sir.
(Q.) Is the original of this writing in the possession of the Mountain Trust Bank?
(A.) Yes, sir.

Thereupon, Mr. R. H. Willis stated that he would file with the Referee, as a part of this deposition, a true and correct copy of said agreement.

(Q.) State whether or not the First National Bank, as subsequent [fol. 47] to these proceedings, accepted a renewal of your personal note?

(A.) They have.

(Q.) Have the individual creditors, as shown by the schedule filed with the Referee, of W. L. Becker, Sr., signed a similar waiver, and is it also in the possession of the Mountain Trust Bank, except the claims of B. C. Mosby?

(A.) Yes, sir.

Mr. R. H. Willis, Counsel for the Mountain Trust Bank, states for the Referee, that he will exhibit the original to Col. Johnston, and file a true and correct copy with the Referee, as part of this deposition.

By Mr. Johnston:

(Q.) I hand you a note, held by the Liberty National Bank, for $17,150.00, dated September 22nd, 1919, which is certified by R. J. Watson, Clerk, as being a copy of the original note on file in his office and ask you if you are W. L. Becker, Jr., who endorsed said note?

(A.) I am W. L. Becker, Jr., and I have endorsed a note at the Liberty National Bank, but not having in my hand the original, I am unable to say whether my name is on the note until I can see it.

W. L. Becker, Sr., recalled:

By Col. Johnston:

(Q.) What is the value of your residence, and what mortgage is upon it?

(A.) I would not attempt to value it. The mortgage is $2,500.00.

(Q.) Mr. Becker, you state that you would not undertake to value your residence. Have you no value on it?

(A.) No, sir.

(Q.) Is it worth $10,000.00?

(A.) I should say it was.

(Q.) Is it worth at least $10,000.00? Do you think?

(A.) I don't think at all.

(Q.) When you came to make up your schedule, what did you think of it then?

(A.) Whatever that schedule says.

(Q.) How could you put a value on it at the time you make up the schedule, but decline now?

(A.) I just simply had not thought about it. The market conditions were unsettled.

[fol. 48] (Q.) I am asking the value of it?

(A.) If I were in a position to sell it this evening, I would not know what to ask for it.

Depositions taken by A. J. Hiatt. Fee, —.

In United States District Court

Agreed Statement of Facts Taken From the Record—Filed June 7, 1922

It is hereby stipulated and agreed between counsel of record in this case, on appeal and on petition to superintend and revise:

(1) That Respondent and appellee Bank filed on January 6th, 1921, proof of claim against W. L. Becker, Sr., and W. L. Becker, Jr., partners trading as the Roanoke Provision Company, and likewise filed proof of claim against W. L. Becker, Sr., individually, on May 31st, 1921, and against W. L. Becker, Jr., individually on May 31st, 1921, and that the allegations of the proof of claim against W. L. Becker, Sr., are the same as the allegations contained in the proof of claim filed against W. L. Becker, Jr., which is to be printed with the record, and the proof against the Roanoke Provision Company, while against the partnership alone, alleges that W. L. Becker, Sr., and Jr., "in their individual capacity are not bankrupts, and that no petition has been filed against them to have them adjudged bankrupts, and that as individuals they are not insolvent."

(2) That on December 1st, 1921, James A. Bear, Trustee, filed with A. P. Staples, Special Referee, his specifications of objections in writing to the allowance of the claim of the Liberty National Bank as a secured or priority claim. The statement and allegations of said specifications of objections are the same as the statements and allegations of the petition of said Trustee for an appeal in this case, [fol. 49] which is printed under paragraph 9 of the stipulation of counsel as to record.

Harvey B. Apperson, Attorney for Petitioner and Appellant.
Jas. D. Johnston, Attorney for Respondent and Appellee.

In U. S. District Court

Opinion of Referee

The Claimant Bank contends that the partnership bankruptcy, even though occurring within four months of the rendition of its judgment against the individuals composing the partnership yet does not affect the lien of the judgment upon the individual estates.

On the other hand the Trustee contends that said judgment is a preference and the lien thereof, even upon the individual estates, is avoided under Section 67-F by the filing of the partnership petition within the four months' period.

No case has been found deciding the precise point here raised, nor are the authorities in accord upon the general principles involving the administration of partnership and individual estates where only the firm is in bankruptcy; for since the filing of the individual petitions came too late here to render the bank's judgment a preference,

it would seem that the question here must be decided upon the principles which would apply if the individuals had not filed petitions.

There is no longer any doubt that the partnership bankruptcy requires the administration by the bankruptcy court of the individual estates as well as of the partnership estates. Francis vs. McNeal, 228 U. S. 702.

But is the bankruptcy court to distribute the individual estates among the individual creditors according to the principles of the bankruptcy act, or according to state law, just as though there was no bankruptcy? The answer to this questiion has not been found in the decided cases. It would seem to depend largely upon the extent to which the doctrine is to be carried that a partnership is a separate entity from the individuals composing it. One line of cases, [fol. 50] following in Re Bertenshaw, 85 C. C. A. 61, unquestionably carry the entity doctrine too far, as the supreme court held in Francis vs. McNeal, supra, referring particularly to the Bertenshaw case. The erroneous conclusions of these cases appear to have resulted from what the supreme court has held to be a misconception of the purpose and meaning of Section 5-H of the Act, which is as follows:

"In the event of one or more but not all of the members of a partnership being adjudged bankrupt, the partnership property shall not be administered in bankruptcy, unless by consent of the partner or partners not adjudged bankrupt; but such partner or partners not adjudged bankrupt shall settle the partnership business as expeditiously as its nature will permit, and account for the interest of the partner or partners adjudged bankrupt."

In the Bertenshaw case this section was improperly construed to mean that when the partnership and some but not all the partners are in bankruptcy the court acquires no jurisdiction over the individual estates; and this case also recognizes the now clearly erroneous theory that the partnership, as a separate entity, can be bankrupt, though one or more of the partners be solvent.

Thus, the erroneous principles of the Bertenshaw line of cases have been followed and expanded by other courts until now it cannot be said from the decisions what rules are properly applicable to a partnership bankruptcy, or whether, in fact, the adjudication of the partnership as bankrupt does not necessarily carry with it the adjudication of the individual partners as well. In Re Forbes, 128 Fed. 137.

Since the partnership adjudication can only be had upon the insolvency of the firm and all the partners and requires the individual partners to file individual schedules of their separate assets and liabilities, and gives the court jurisdiction to administer the individual as well as the partnership estates, it may well be asked what change is wrought or additional jurisdiction conferred by the filing of individual petitions? In Francis vs. McNeal, supra, Mr. Justice Holmes says:

[fol. 51] "Since Cory on Accounts was made more famous by Lindley on Partnership, the notion that the firm is an entity distinct from its members has grown in popularity, and the notion has been confirmed by recent speculations as to the nature of corporations and the oneness of any somewhat permanently combined group without the aid of law. But the fact remains as true as ever that partnership debts are debts of the members of the firm, and that the individual liability of the members is not collateral like that of a surety, but primary and direct, whatever priorities there may be in the marshaling of assets. The nature of the liability is determined by the common law, not by the possible intervention of the bankruptcy act. Therefore ordinarily it would be impossible that a firm should be insolvent while the members of it remained able to pay its debts with money available for that end. A judgment could be got and the partnership debt satisfied on execution out of the individual estates."

"The question is whether the bankruptcy act has established principles inconsistent with these fundamental rules, although the business of such an act is, so far as may be, to preserve, not to upset, existing relations. It is true that by Section 1, the word 'persons,' as used in the act, includes partnerships; that by the same section, a person may be deemed insolvent when his property, exclusive, etc., shall not be sufficient to pay his debts; that by Section 5a, a partnership may be adjudged a bankrupt, and that by Section 14a any person may file an application for discharge. No doubt these clauses, taken together, recognize the firm as an entity for certain purposes, the most important of which, after all, is the old rule as to the prior claim of partnership debts on partnership assets, and that of individual debts upon the individual estate. Section 5g. But we see no reason for supposing that it was intended to erect a commercial device for expressing special relations into an absolute and universal formula,—a guillotine for cutting off all the consequences admitted to attach to partnerships elsewhere than in the bankruptcy courts. On the contrary, we would infer from Section 5, clauses a through g, that the assumption of the bankruptcy act was that the partner-[fol. 52] ship and individual estates both were to be administered, and that the only exception was that in h, "in the event of one or more, but not all, of the members of a partnership being adjudged bankrupt." (30 Stat. at L. 548, Chap. 541, U. S. Comp. Stat. 1901, p. 3424.)"

"In that case, naturally, the partnership property may be administered by the partners not adjudged bankrupt, and does not come into bankruptcy at all except by consent. But we do not perceive that the clause imports that the partnership could be in bankruptcy and the partners not. The hypothesis is that some of the partners are in, but that the firm has remained out, and provision is made for its continuing out. The necessary and natural meaning goes no further than that."

"On the other hand, it would be an anomaly to allow proceedings in bankruptcy against just debtors from some of whom, at any time before, pending, or after the proceeding, the debt could be collected in full. If such proceedings were allowed, it would be a further

anomaly not to distribute all the partnership assets. Yet the individual estate, after paying private debts, is part of those assets, so far as needed. Section 5f. Finally it would be a third incongruity to grant a discharge in such a case from the debt considered as joint, but to leave the same persons liable for it considered as several. We say the same persons, for, however much the difference between firm and member under the statute be dwelt upon, the firm remains at common law a group of men, and will be dealt with as such in the ordinary courts for use in which the discharge is granted. If, as in the present case, the partnership and individual estates together are not enough to pay the partnership debts, the rational thing to do, and one certainly not forbidden by the act, is to administer both in bankruptcy. If such a case is within Section 5h, it is enough that Francis never has objected to the firm property being administered by the trustee.

"If it be said that the logical result of our opinion is that the partners ought to be put into bankruptcy whenever the firm is, as held by the late Judge Lowell, in an able opinion (Re Forbes, 128 Fed. 137), it is a sufficient answer that no such objection has been taken, but, on the contrary, Francis has consented and agreed to [fol. 53] hand over his property according to the order of the court. So far as Vaccaro vs. Security Bank, 43 C. C. A. 279, 103 Fed. 436, 442, is inconsistent with the opinion of the majority in Re Bertenshaw, 17 L. R. A. (N. S.) 886, 85 C. C. A. 61, 157 Fed. 363, 13 Ann. Cas. 986, we regard it as sustained by the stronger reasons and as correct."

Thus this implied approval of the principles announced in the Forbes case, supra, may be said to leave it an open question whether the adjudication of the partnership as bankrupt is not also an adjudication of the individual partners.

See also, In Re Stokes, 106 Fed. 312.

But assuming that the individuals, apart from the partnership, are not in bankruptcy by virtue of the adjudication of the firm, the individual estates clearly are. And if the partnership bankruptcy draws into the bankruptcy court the individual estates for distribution does it not at the same time bring these estates within the influence of the rules prescribed by the bankruptcy act by which this distribution is to be made? The act is dual in its operation. On the one hand, it operates in rem, providing for the distribution of the estate according to well defined principles; on the other hand it operates in personam granting the persons adjudged bankrupt a discharge from their debts. If it can be said that in order to invoke the latter function and receive a discharge individuals composing a partnership must file separate individual petitions, nevertheless it is clear that the former, i. e., the right and duty to distribute the individual estates, results from the partnership adjudication.

And not only does the act confer this jurisdiction, but it provides for how the several estates are to be administered. This clause 5-G says:

"The Court may permit the proof of the claim of the partnership estate against the individual estates, and vice versa, and may marshall the assets of the partnership estate and individual estates so as to prevent preferences and secure the equitable distribution of the property of the several estates."

[fol. 54] This provision would seem to bring the individual estates within the same rules as to preferences and equitable distribution as the partnership estates; it certainly makes no express distinction between them. And I have been unable to find in the entire act any provision which would admit of the conclusion that the partnership adjudication, though bringing the distribution of the individual estates within the scope of the bankruptcy proceedings, yet does not, at the same time, require the administration of those estates upon the basic principles of the act. Where the estate is, by express terms, drawn into the proceedings for complete distribution, it would seem to require some express provision to negative the natural inference that this distribution is to be made in accordance with the cardinal principles laid down by the act. There being no such provision, in my opinion the Trustee's title to the individual estates relates back to the filing of the partnership petition and as the Bank's judgment was recovered within four months of that time the lien thereof is annulled.

And this conclusion is supported by the principles applied by the Supreme Court's decision in the case of Miller vs. New Orleans Acid and Fertilizer Company, 211 U. S. 496. In that case one of the individual members of a partnership had, out of his individual estate, paid defendant Miller a debt in full. Under the Louisiana State law this was a preference which, not only individual, but partnership creditors as well, might set aside. Three partnership creditors brought a bill to recover the sum paid, invoking this law of the state, under which these three creditors were given a lien upon the fund when recovered. More than four months after the debt had been paid Miller, but within four months of the institution of the suit to set it aside, the partnership was adjudged bankrupt, though the individual partners were not. The Trustee, as permitted by Section 67-F of the bankruptcy act, was substituted plaintiff in place of the three partnership creditors, and continued to prosecute in the state court for the benefit of the bankrupt estate, the suit to enforce the lien acquired by the original plaintiffs upon the fund paid Miller.

The highest state court having held the payment a preference under state law, Miller carried the case by writ of error to the Fed-[fol. 55] eral Supreme Court. One of the principle questions there raised was whether the partnership trustee could complain of the payment in full of a partner's individual debt out of his individual estate, since under the method of distribution prescribed by the bankruptcy act, the individual creditors must be paid in full before any of the individual estate could be diverted to partnership debts.

The Court held:

1. That though under the Louisiana law, the partnership creditors shared with the individual creditors in the distribution of the partner's individual estate, this rule was superseded by the adjudication of the firm in bankruptcy, and the provisions of the bankruptcy act covering this subject were controlling; and

2. That the state court rightly held the Trustee entitled to recover this fund for the benefit of other individual creditors of the partner, if there should be any, and that the method of distribution of this fund among the individual's creditors, was solely for the bankrupt court to determine.

But the court said that "On proof of the claims against such individual estate, if it be that Miller is the only individual creditor, he will be entitled, by way of distribution, to the full amount paid in by him because of the method of distribution ordained by the bankrupt law."

Thus, the right of the partnership Trustee in this case to recover the fund was sustained, not for any benefit which could accrue to the partnership estate, but solely for the benefit of other individual creditors; nor was the trustee entitled to enforce the lien of the three partnership creditors for the benefit of the partnership estate, to the detriment of the individual creditor. And the court further held that this lien of the three partnership creditors on this fund (part of the individual estate), was avoided upon the filing of the bankruptcy petition within four months, though it was not shown that [fol. 56] other partnership creditors would be prejudiced if those three were allowed to enjoy their lien.

As applied to the question before us, it may be said that the foregoing case decides that if a partnership creditor obtains a lien upon the estate of an individual partner, within the four months' period, this lien is a preference if it interferes, in any way, with the method of distribution fixed by the act, and will be set aside, even though the enrichment of the partnership creditors who obtain the lien is solely at the expense of individual creditors.

It seems to be a logical conclusion, therefore, from what this case decides, that though the partners are not in bankruptcy, separately from the firm, nevertheless the manner and method of distribution of their individual estates among the individual creditors, and these creditors' rights, inter esse, are controlled by the bankruptcy act.

Counsel for the bank relies principally upon Remington on Bankruptcy, citing, among others, Section 2263, which counsel quotes as follows:

"Thus, liens for individual debts on the individual property of a partner are not voidable as preferences, nor nullified as legal liens by the bankruptcy of the partnership."

But the quotation is from the 1908 edition, and no authority is cited which sustains it, whereas in the 1915 edition the author adds to the foregoing, the following:

"However, by Section 5 of the act not only is the partnership trustee the trustee also for the individual estate, even where there is no individual adjudication, yet Section 5 in Clause g provides that the assets are to be so marshalled as to prevent preferences, and to secure the equitable distribution of the property of the several estates, from which it might be implied that the individual estates of the non-bankrupt partners would be treated in this respect as if there had been an individual bankruptcy along with the partnership adjudication;" citing Francis vs. McNeal, supra.

And Section 2268 of the old edition of Remington, also quoted by counsel for the bank, has been changed to read as follows:

[fol. 57] "Nor, in general, are transfers by individual partners of individual assets voidable as preferences in partnership bankruptcies (unless the individual be also bankrupt, or perhaps, though not adjudicated bankrupt, he be insolvent and his estate be in process of administration in the firm bankruptcy by virtue of Section 5)."

And the case of Lehigh Lumber Company, 101 Fed. 216, cited by Remington and also relied on by counsel, I do not think sustains the proposition for which it is cited. In that case a former firm creditor had surrendered a firm note and taken instead a note of an individual member. The transaction was reviewed by the court and held to be such as to constitute the creditor a bona fide creditor of the individual partner, and it was accordingly held that the judgment obtained on the note against the individual partner did not operate to the prejudice of the partnership creditors. But the court was careful to add:

"Whether the judgment is valid as against her individual creditors is a question not before us, and not decided, but it is clear that the rights of the creditors of the firm are not affected by its entry."

Thus the court expressly states it does not decide the question now before us.

The claim of the Liberty National Bank, therefore, is disallowed as a secured claim, but may be allowed as an unsecured claim against all three estates, and it may be so ordered.

Abram P. Staples, Special Referee.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA

[Title omitted]

ORDER OF REFEREE OF DECEMBER 9, 1921

[fol. 58] BEFORE A. P. STAPLES, SPECIAL REFEREE IN BANKRUPTCY, AT ROANOKE, VIRGINIA, IN SAID DISTRICT, ON THE 9TH DAY OF DECEMBER, 1921

Order

This day came the Trustee in Bankruptcy, James A. Bear, by his attorney, and the Liberty National Bank of Roanoke, Virginia, a corporation, by its Attorney, and these causes coming on to be heard upon the two proofs of debt filed by the Liberty National Bank on the 31st day of May, 1921, asserting a debt of $5,566.00 as secured by the lien of a judgment recovered on the 30th day of July, 1920, in the Clerk's Office of the Corporation Court for the City of Roanoke, Virginia, (an abstract of which said judgment was filed with the proof of claim), the claimant alleging that said judgment constitutes a lien upon certain real estate, of the individual Bankrupts, W. L. Becker, Sr., and W. L. Becker, Jr., situated in Roanoke City, Virginia and upon the exceptions and objections to said proof of debt filed by the Attorney for the Trustee in Bankruptcy together with his grounds of objection thereto, filed in writing.

And the referee, upon consideration of the questions thereby presented, being of opinion that the judgment of the claimant, Liberty National Bank, having been recovered within four months of the filing of the petition in Bankruptcy against the partnership of W. L. Becker & Co., and the Roanoke Provision Company, of which partnership the Bankrupts, against whose estate the lien is claimed, viz: W. L. Becker, Sr., and W. L. Becker, Jr., were both members the lien thereof is avoided and annulled, it is ordered that the said claims of the Liberty National Bank be disallowed as secured claims against any of the Bankrupt estates; It is further ordered that said claims of the Liberty National Bank be and are hereby allowed as unsecured claims against the estates of W. L. Becker, Sr., and W. L. Becker, Jr., and the Roanoke Provision Company.

Given under my hand this 9th day of December, 1921.

Abram P. Staples, Special Referee in Bankruptcy.

[fol. 59] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA

[Title omitted]

PETITION FOR APPEAL FROM REFEREE ORDER OF DEC. 9, 1921—Filed March 7, 1922, Before Referee

To A. P. Staples, Esq., Special Referee in Bankruptcy:

The Liberty National Bank of Roanoke, Virginia, a corporation, and a creditor of each of the above named bankrupts, conceiving that it is aggrieved by the final order entered on the 9th day of December, 1921, in the above entitled proceedings, denying the priority claimed by petitioner on its judgment against the above named bankrupts in their individual capacity, and denying that said judgment as to each of said bankrupts is a prior lien on the individual assets real and personal of said bankrupts, does hereby petition for an appeal from said order to the United States District Court for the Western District of Virginia, and prays that its appeal may be allowed and a citation granted, directed to James A. Bear, Trustee in Bankruptcy for each of the above named bankrupts in their individual capacity, commanding him to appear before said court, to do and receive what may appertain to justice to be done in the premises, and that a transcript of the record, proceedings and evidence in said proceedings, duly authenticated, may be transmitted to the District Court of the United States for the Western District of Virginia, at Roanoke, Virginia:

Petitioner excepts to so much of said order as refuses to allow the priority claimed for its judgment against the individual assets of the above named bankrupts, and says that said order is erroneous and contrary to law.

Petitioner complains of the foregoing error in said order disallow-[fol. 60] ing the priority claimed for its judgment in its proofs of debt filed separately against each of said bankrupts in his individual capacity, and complains that said order is erroneous and illegal because it denies the priority so claimed for said judgment against the individual assets of each of said bankrupts;

Petitioner says that said order is erroneous, and complaint is made thereof, because of the error in holding that the adjudication of certain partnerships known as the Roanoke Provision Company and W. L. Becker & Company, of which partnerships W. L. Becker, Sr., and W. L. Becker, Jr., were members, on August the 20th, 1920 dissolved the lien created by its judgment recovered against W. L. Becker Sr., and W. L. Becker, Jr., individually for $5,566.00, with interest on $5,150.00 from June the 15th, 1920, $5.00 attorney's fee and five per cent collection fee on $5,150.00. This judgment was recovered in the Corporation Court for the City of Roanoke, Virginia, at the July term, 1920, and docketed on July 31st, 1920, according to the laws of Virginia, in Judgment Lien Docket No. 7 page 161.

The foregoing partnerships were adjudicated bankrupt on August

the 20th 1920, on an involuntary petition, but the individuals, W. L. Becker, Sr., and W. L. Becker, Jr., were not adjudged bankrupts individually until April the 28th 1921, when they filed their voluntary petition. Petitioner says that more than four months having elapsed after the recovery and docketing of its judgment against said bankrupts before they were adjudged bankrupts individually that said judgment had become final at the time they were so adjudged individually, and that said judgment was and is valid and subsisting lien and a prior lien on the real and personal assets owned individually by said bankrupts, and that said judgment was not dissolved by said adjudication of said partnerships on August the 20th, 1920, or by the subsequent adjudication of the individuals on April the 28th, 1921;

Petitioner says that said order is erroneous. It is based on the theory that because the bankrupt court, when the partnerships were adjudicated, might have taken control of both partnership and individual assets, this would prevent the judgment of petitioner from becoming final.

[fol. 61] Petitioner says that the order is wrong and erroneous both as to the law and the facts in taking such a position. The bankruptcy act makes a partnership a separate entity and allows a partnership to be adjudged a bankrupt, and the adjudication of said partnership on August the 20th, 1920, while it did dissolve petitioner's judgment as to said partnerships, yet, the solemn judgment of a court of record against the individuals could only be dissolved by the subsequent adjudication of such individuals within four months from the rendition of such judgment, and then only under Sec. 67-e of the Bankruptcy Act where "It appears that said lien was obtained and permitted while the defendant was *in*solvent, and that its exist*a*nce and enforcement will work a perference." The judgment of petitioner against the individual assets worked no preference against the partnership creditors, and it was this class of creditors alone that the bankruptcy court was dealing with until the individuals were adjudicated bankrupts on April the 28th, 1921;

The order is erroneous relative to the individual assets having passed under the control of the bankrupt court. While it is true that the individual partners may have filed, in the bankruptcy proceedings against the partnership, a list of their individual assets, yet, the facts are that they did not deliver possession or control of said individual assets to the bankruptcy court, but, upon the contrary, exercised independent ownership and control over said individual assets, and without the consent of the bankruptcy court, and without attempting to obtain the consent of the bankruptcy court, said individual bankrupts actually mortgaged their real estate, held individually, to secure a large sum of money which was offered as a composition to their partnership creditors, along with their individual creditors, when the bankrupts knew that it would take more than all of their individual assets to pay their individual creditors;

Petitioner says that each of the bankrupts owned and resided in valuable residences, and also owned a one-fourth undivided interest each in lots in the City of Roanoke, Virginia, and that said bankrupts

remained in entire control of all of said houses and interest in houses and lots, until May the 16th, 1921, and possibly later; when [fol. 62] a trustee in bankruptcy was appointed for them individually;

Petitioner says that said bankrupts paid no rent for the residences which they owned individually and occupied with their families uninterruptedly for a year during the time of the partnership bankrupt proceedings, until some time in Aug., 1921.

Wherefore, your petitioner prays that an appeal may be allowed in the above entitled cause and that the record and proceedings therein, with all things concerning the same, may be sent to the Judge of the District Court for the Western District of Virginia, and that the errors complained of in said order of the Special Referee may be reviewed, and if error be found corrected according to the laws and customs of the United States.

The Liberty National Bank, By L. R. Tucker, Cashier.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA

[Title omitted]

PETITION FOR REVIEW OF REFEREE ORDER OF DEC. 9, 1921—Filed Before Referee on March 7, 1922

To A. P. Staples, Esq., Special Referee in Bankruptcy:

Your petitioner, The Liberty National Bank of Roanoke, Virginia, respectfully shows:

That your petitioner is a creditor of W. L. Becker, Sr., and W. L. Becker, Jr., the above named bankrupts, in their individual capacity, and that its claim has been allowed herein as a general creditor but the priority set up has been denied;

That on the 9th of December, 1921, an order, a copy of which [fol. 63] is hereto annexed was made and entered herein;

That such an order was, and is erroneous, in that it decides that "The claim of The Liberty National Bank * * * is disallowed as a secured claim, but may be allowed as an unsecured claims."

Petitioner assigns as error in said order the refusal by the referee to allow the priority claimed for its debt, which priority it was entitled to hold and maintain and which it asserted in its proof of debt, which is shown by the following facts:

At the July term, 1920, of the Corporation Court of the City of Roanoke, petitioner recovered judgment against W. L. Becker, Sr., and W. L. Becker, Jr., individually, they being sued individually, process being served on them individually, and the court order giving judgment against them individually, as well as against them trading as The Roanoke Provision Company;

This judgment was for $5,566.00, with interest on $5,150.00 from June the 15th, 1920, $5.00 attorney's fee and five per cent collection fee on $5,150.00;

The order refuses the priority claimed by petitioner on its judgment against the individuals and the individual property, because, on August the 20th, 1920, W. L. Becker, Sr., and W. L. Becker, Jr., as partners were adjudged bankrupts on an involuntary petition, but petitioner says that W. L. Becker, Sr., and W. L. Becker, Jr., were not adjudged bankrupts individually at the time the partnership was adjudged, and says that W. L. Becker, Sr., and W. L. Becker, Jr., were not adjudged bankrupts individually until April the 28th, 1921, when they filed their voluntary petition in bankruptcy;

Petitioner's judgment having been docketed in the Clerk's Office of the City of Roanoke according to the laws of Virginia on July the 31st, 1920, in Judgment Lien Docket No. 7, page 161, became a lien on all the real estate owned by said bankrupts individually, and more than four months having elapsed from the docketing of said judgment before said individuals were adjudged bankrupts individually, said judgment became and was final, and a legal and binding lien upon the real estate of the individuals held in their individual [fol. 64] capacity and was unaffected by the bankruptcy proceedings of the partnership, because the individuals were not adjudged bankrupt at the time the partnership was adjudged on an involuntary petition and said lien of said judgment was unaffected by the adjudication of the individuals to be bankrupts because more than four months had elapsed since said judgment was recovered and docketed.

Petitioner says that the entire individual assets will not be sufficient to pay the individual creditors and that there will be no surplus from the individual assets to be distributed among the partnership creditors;

Petitioner says that each of the bankrupts owned and resided in valuable residences, and also owned a one-fourth undivided interest each in lots in the City of Roanoke, Virginia, and that said bankrupts remained in entire control of all of said houses and interest in houses and lots until May the 16th, 1921, and possible later, when a trustee in bankruptcy was appointed for them individually.

Petitioner says that said bankrupts paid no rent for the residences which they owned individually and occupied with their families uninterruptedly during all the time of the partnership bankrupt proceedings and until some time in May, 1921, and possible later, when the trustee of their individual estates assumed nominal supervision over said real estate holdings.

Petitioner says that while the individual partners may have filed in the bankruptcy proceedings a list of their individual assets, real and personal, they did not deliver possession or control of said individual assets to the bankrupt court, but, upon the contrary, exercised independent ownership and control over said individual assets and without the consent of the bankruptcy court, or even without asking the consent of the bankruptcy court, actually mortgaged their real estate, held individually, to secure a large sum of money to offer

as a composition to their partnership creditors along with their individual creditors, when the bankrupts knew that it would take more than all of their individual assets to pay their individual creditors;

Petitioner says that it excepts to the order because it refuses to allow [fol. 65] petitioner the priority claimed for its judgment against the individual property of the individual bankrupts and complains that in this respect said order is erroneous and illegal.

Wherefore, your petitioner, feeling aggrieved because of so much of said order as denies priority to its judgment, prays that the same may be reviewed as provided in the bankruptcy law of 1898, and General Order XXVII.

Dated January 31, 1922.

Liberty National Bank of Roanoke, Va. L. R. Tucker, Cashier. Jas. D. Johnston, p. d.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA

[Title omitted]

ASSIGNMENT OF ERRORS BEFORE A. P. STAPLES, SPECIAL REFEREE

Now comes The Liberty National Bank of Roanoke, Virginia, a corporation, a creditor of each of the foregoing bankrupts in his individual capacity, and files the following assignment of errors:

(1) That the Special Referee erred in finding that the judgment of The Liberty National Bank was not a prior lien on the real and personal assets of each of said bankrupts owned and held by them in their individual capacity;

(2) That Special Referee erred in finding that the judgment recovered by the Liberty National Bank of Roanoke, Virginia, a corpo- [fol. 66] ration, against W. L. Becker, Sr., and W. L. Becker, Jr., individually was dissolved by the adjudication of the partnership on August the 20th, 1920, when the individuals were not adjudicated to be bankrupts in their individual capacity until April the 28th, 1921, when said judgment was more than four *four* months old.

(3) That said Special Referee erred in finding that the judgment recovered by said bank against said bankrupts individually was a preference;

(4) That said Special Referee erred in holding that said judgment was dissolved against the bankrupts individually and in refusing to allow the priority claimed for said judgment against the individual assets.

The Liberty National Bank of Roanoke, Va., By Jas. D. Johnston, Atty.

Opinion of District Court of May 23, 1922

In re Roanoke Provision Co., alias W. L. Becker & Co., Bankrupt; In re W. L. Becker, Sr., Bankrupt; In re W. L. Becker, Jr., Bankrupt

Opinion

(1) Sec. 61c reads in part:

"A lien * * * obtained in * * * any proceeding at law * * * which was begun against a person within four months before the filing of a petition in bankruptcy (by or) against such person shall be dissolved by the adjudication of such person to be a bankrupt, if," etc.

Sec. 67f reads in part:

"That all * * * liens * * * obtained by legal proceedings [fol. 67] against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt. * * *"

The order of adjudication of Aug. 20th, 1920, declares the partnership to be a bankrupt and distinctly fails to declare the individuals composing the partnership to be bankrupts. It reads so far as is material as follows:

In the District Court of the United States for the Western District of Virginia

In Bankruptcy

In the Matter of W. L. Becker & Company, Trading Also as Roanoke Provision Co., a Partnership Composed of W. L. Becker and W. L. Becker, Jr., Alleged Bankrupt.

At Roanoke in said District, on the 20th day of August, A. D. 1920, before the Honorable Henry C. McDowell, Judge of said Court in Bankruptcy, the petition of Runkle Co., Inc., et al., that W. L. Becker & Company, trading also as Roanoke Provision Co. be adjudged a bankrupt, within the true intent and meaning of the Acts of Congress relating to Bankruptcy, having been heard and duly considered, the said W. L. Becker & Company, trading also as Roanoke Provision Co., a partnership composed of W. L. Becker *nad* W. L. Becker, Jr., is hereby declared and adjudged bankrupt accordingly.

"And, Whereas, the said W. L. Becker & Company, trading also as Roanoke Provision Co., of Roanoke, in the County of Roanoke and District aforesaid, on the 20 day of August, A. D. 1920, was duly adjudged a bankrupt upon a petition filed in this Court against

it on the 6 day of August, A. D. 1920, according to the provisions of the Acts of Congress relating to Bankruptcy, etc."

The wording of the order of adjudication was not an inadvertence, but was the result of the construction I have put on the Bankrupt Act since my first connection with it. The refusal to adjudge the [fol. 68] individuals composing the firm to be bankrupts was, if erroneous, an error which had to be appealed from within ten days from August 20th, 1920. (Section 25 B. A.) As no appeal was taken within the time allowed by law, neither this court nor any other court can now correct the supposed error. The result is that the individuals composing the partnership have, in the partnership proceeding, never been adjudicated bankrupts. Both the filing of a petition within four months and an adjudication thereon are necessary to nullify a lien of judgment. I read the petition which was filed on August 6, 1920, as praying only for an adjudication of the firm. But even if the petition be read as against both the firm and the persons *coming* it, still it was not and never can be, followed by an adjudication against the individuals composing the firm. Hence the case is not within either sub-section C or sub-section F of Section 67, unless it be proper to say that an adjudication that a firm is a bankrupt is ipso facto an adjudication that each member of the firm is also a bankrupt. But there is no good reason supporting such contention and a very strong reason against it. It is everywhere admitted that the Bankrupt Act recognizes that a partnership is a legal entity, distinct from the individuals composing it. To say that an express adjudication of the firm only is an adjudication of the individuals composing it is to utterly refuse to recognize the entity doctrine. It is to say in effect that the firm and the persons composing it are identical and indistinguishable.

It only remains to be said that a party who seeks an advantage from a final and unappealable decree of court must rely on such decree as it is written or not rely on it at all. And a fortiori one not a party who relies on a decree of court must take it as he finds it, because he has never had any standing to complain of it.

(2) If the order of adjudication in the firm case was correctly drafted, it is too obvious to need argument that the bank's lien on the individual estates of the members of the firm has not been nullified. Both a petition against and an adjudication of the individuals composing the firm are necessary to the nullification of the judg- [fol. 69] ment. And here, whatever may be thought of the petition, it is certain that the order of adjudication does not declare the individuals to be bankrupt.

It seems to me to indubitably follow that the lien of the judgment of the Liberty Bank on the individual estates of the members of the firm has not been nullified by the order adjudicating the firm a bankrupt, whether it was erroneously or properly worded. I see therefore no occasion for discussing the propriety of the wording of the order; nor for discussing what would have been the result

had the adjudication in the case brought by firm creditors declared both the firm and the partners to be bankrupts. The ruling of the referee must be reversed and the lien of the American Liberty Bank upheld.

Henry C. McDowell, District Judge. May 23, 1922.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, AT ROANOKE, ON MAY 23RD, 1922

In Bankruptcy

In re W. L. BECKER & Co., Alias Roanoke Provision Co., Bankrupt; In re W. L. Becker, Sr., Bankrupt; In re W. L. Becker, Jr., Bankrupt.

ORDER OF DISTRICT COURT OF MAY 23, 1922

Upon consideration of the petition of Liberty National Bank for a review of the order of the special referee of December 9th, 1921, it is, for reasons set out in an opinion this day filed, ordered that the said order be and it is hereby reversed, and this cause remanded for such further proceedings in consonance with the above mentioned opinion as may be necessary or proper.

The deputy clerk of this court at Roanoke will forthwith certify a copy hereof to Abram P. Staples, Esq., special referee.

[fol. 70] IN THE DISTRICT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA, AT ROANOKE

[Title omitted]

PETITION FOR APPEAL AND ASSIGNMENT OF ERRORS—Filed May 31, 1922

Now, on this 31st day of May, 1922, comes James A. Bear, Trustee in Bankruptcy of the Estates of W. L. Becker, Sr., and W. L. Becker, Jr., partners trading as W. L. Becker & Company and the Roanoke Provision Company, and of the individual estates of W. L. Becker, Sr., and W. L. Becker, Jr., and files the following assignments of error, upon which he will rely in his prosecution upon his appeal in the above entitled cause from the judgment rendered by this Honorable Court on May 23rd, 1922:

First. The District Court of the United States for the Western District of Virginia erred in reversing by its said order the said order of the Referee dated December 9th, 1921, adjudging and decreeing that the lien of the judgment of the Liberty National

Bank was invalid as a secured or priority claim on the funds in the hands of your petitioner, but adjudging and decreeing that said claim should be allowed as an unsecured claim against the estates of W. L. Becker, Sr., and W. L. Becker, Jr., and the Roanoke Provision Company, which said order of said Referee sustained the objection of your petitioner as to the allowance of said claim as a secured or priority claim. The said District Court by reversing the said order of the Referee and upholding the alleged lien of the [fol. 71] Liberty National Bank was erroneous, in that on August 20th, 1920, the firms of W. L. Becker & Company and the Roanoke Provision Company, composed of W. L. Becker, Sr., and W. L. Becker, Jr., were adjudged bankrupts and by virtue of the filing of said petition and said adjudication, and further proceedings had in said matter before the Bankruptcy Court and the Referees thereof, and especially the filing by the said W. L. Becker, Sr., and W. L. Becker, Jr., of lists of their assets and liabilities in compliance with an order of the Referee, all of the property of W. L. Becker, Sr., and W. L. Becker, Jr., then became and was as of the date of the filing of the petition in bankruptcy of Runkle & Company, to-wit, August 6th, 1920, within and under the jurisdiction of the United States District Court for the Western District of Virginia, and became and was subject to administration in accordance with the Acts of Congress relating to bankruptcy, under and by virtue of which Acts no liens could be acquired and perfected on said individual properties, or the proceeds of sale thereof, which would be entitled to priority, or which could be proven as secured claims.

Second. The District Court of the United States for the Western District of Virginia erred in reversing the said order of the Referee dated December 9th, 1921, and thereby upholding the alleged lien of the Liberty National Bank for the reason that by virtue of the appointment and qualification of your petitioner as Trustee of both partnership and individual estates, title to all of the property of both partnership and individual estates thereby became and was vested in your petitioner as Trustee, whose title thereto relating back to the date of the filing of said petition of Runkle & Company, to-wit, on August 6th, 1920, and no liens could be acquired or perfected thereon which would disturb or render inoperative the provisions of the Act of Congress relating to Bankruptcy and the administration of estates in bankruptcy. The effect of the said order of said District Court is to allow a lien to be perfected on the property of the bankrupts after said property became subject to the jurisdiction of the bankruptcy court.

Third. The District Court of the United States for the Western [fol. 72] District of Virginia erred in reversing the said order of the Referee dated December 9th, 1921, and thereby upholding as a lien the alleged judgment of the Liberty National Bank of Roanoke, Virginia, for the reason that said judgment had not been recovered four (4) months prior to the filing of the petition of Runkle & Company, to-wit, August 6th, 1920, and four (4) months prior to the said order of Referee R. Q. Mosby, entered August 23rd, 1920, and

that said judgment only became four months old prior to the filing of the individual voluntary petitions of W. L. Becker, Sr., and W. L. Becker, Jr., to-wit, April 27th, 1921, because litigation was pending in said District Court over the offer of composition filed in the cause, and that appellee bank is now attempting to take advantage of time consumed with litigation pending over said offer of composition.

Fourth. The United States District Court for the Western District of Virginia erred in reversing the said order of the Referee dated December 9th, 1921, and upholding the alleged lien of the Liberty National Bank of Roanoke Virginia, in that the proof taken in this proceeding shows that the debt evidenced by the judgment claimed to be entitled to priority against the individual estates of W. L. Becker, Sr., and W. L. Becker, Jr., was in truth and in fact a partnership debt and all the proceeds of the note on which the judgment was obtained were in fact used for partnership purposes, and not for the purposes of the individuals.

Wherefore, the undersigned, Trustee as aforesaid, avers that this is an appeal from a judgment allowing a claim of over $500.00, and is hence cognizable by the United States Circuit Court of Appeals for the Fourth Circuit, and he therefore prays for an appeal to the United States Circuit Court of Appeals, Fourth Circuit.

James A. Bear, Trustee in Bankruptcy as Aforesaid. Jas. A. Bear, Hall, Wingfield & Apperson, Attorneys.

Received May 31, 1922.

(Signed) Henry C. McDowell, District Judge.

[fols. 73 & 74] IN UNITED STATES DISTRICT COURT

MEMORANDUM REQUIRED BY RULE 14, SECTION 7, OF THE RULES OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

I, L. T. Hyatt, Clerk of the United States District Court for the Western District of Virginia, at Roanoke, Virginia, certify as follows:

That petition for appeal was filed May 31, 1922.

That order allowing appeal is dated June 1, 1922.

That no appeal bond was required.

That citation is dated June 1, 1922, and that service thereof was accepted on June 2, 1922.

That the original papers mentioned in this memorandum have been sent to the clerk of the United States Circuit Court of Appeals, at Richmond, Virginia.

Given under my hand this 8th day of June, 1922.

L. T. Hyatt, Clerk, By Frank J. Hall, Deputy.

In United States District Court

Clerk's Certificate

United States of America,
Western District of Virginia, To wit:

I, L. T. Hyatt, Clerk of the United States District Court for the Western District of Virginia, at Roanoke, Virginia, certify that the foregoing is a true transcript of the record and proceedings of the District Court of the United States for the Western District of Virginia made up in accordance with the stipulation of counsel as to the documents to be included in the transcript filed in said cause on June 7, 1922.

In testimony whereof, I hereunto set my hand and affix the seal of the said court this 8th day of June, 1922.
L. T. Hyatt, Clerk, By Frank J. Hall, Deputy. (Seal.)

[fol. 75] Proceedings in the United States Circuit Court of Appeals for the Fourth Circuit

No. 2016

[Title omitted]

Appeal from the District Court of the United States for the Western District of Virginia, at Roanoke

June 9, 1922, transcript of record is filed and the cause docketed.
Same day, original petition for appeal, order allowing appeal, and citation are certified up under Sec. 7 of Rule 14.
Same day, appearance of Harvey B. Apperson is entered for the appellant.

[fol. 76] Motion of Appellee to Dismiss Appeal—Filed June 10, 1922

Now comes The Liberty National Bank of Roanoke, Virginia, a corporation, the Respondent in the above entitled matter, and moves the Court to dismiss the Petition for an Appeal.

(1) Because no one of the errors complained of in said petition constitutes any ground for an appeal from the decision of the District Court of the United States for the Western District of Virginia.

(2) Because there is no error in the opinion of said District Court and no error in the order based on said opinion.

(3) Because Petitioner bases all his objections on the theory that the District Court of the United States for the Western District of Virginia, erred in not holding that the bankruptcy of the partner-

ship dissolved the judgment recovered against the individual partners in their individual capacity. Respondent denies that the bankruptcy of the partnership, which is a separate entity, dissolved its judgment against the individuals, and says that its judgment against the individuals was more than four months old when said individuals were adjudged bankrupts.

(4) Because no proper or legal proceedings have been taken or had to avoid or discharge the lien of Respondent's judgment against said W. L. Becker, Sr., and W. L. Becker, Jr., individually. The objections filed by Petitioner against the allowance of Respondent's judgment as a secured debt do not allege that either W. L. Becker, Sr., or W. L. Becker, Jr., was insolvent at the time said judgment was recovered.

The Petition for an Appeal nowhere alleged that either W. L. Becker, Sr., or W. L. Becker, Jr., was insolvent at the time said judgment was recovered.

Nowhere in the proceedings is it alleged that W. L. Becker, Sr., [fol. 77] and W. L. Becker, Jr., were insolvent at the time said judgment was recovered.

Respondent says that it is absolutely essential that Petitioner allege and prove by satisfactory evidence that W. L. Becker, Sr., and W. L. Becker, Jr., were insolvent at the time the lien of Respondent's judgement attached. Respondent says that Petitioner has neither alleged nor proven insolvency.

(5) Because "the order of adjudication of August 20th, 1920, declares the partnership to be a bankrupt, and distinctly failed to declare the individuals composing the partnerships to be bankrupts," was not appealed from. "The refusal to adjudge the individuals composing the firm to be bankrupts was, if erroneous, an error which had to be appealed from within ten days from August the 20th, 1920," and no appeal was taken.

Liberty National Bank of Roanoke, Virginia, By Jas. D. Johnston, Attorney.

STATE OF VIRGINIA,
City of Roanoke, To wit:

I, M. N. Ronald, a Notary Public in and for the City and State aforesaid, do hereby certify that L. R. Tucker has this day personally appeared before me in my City and State aforesaid, and made oath that he is cashier of the Liberty National Bank of Roanoke, Virginia, and the matters and things set forth in the foregoing motion to dismiss are true to the best of his knowledge and belief.

My commission expires on the 10th day of March, 1925.
Given under my hand this the 9th day of June, 1922.

W. M. Ronald, Notary Public.

June 14, 1922, appearance of Jas. D. Johnston is entered for the appellee.

[fol. 78] IN U. S. CIRCUIT COURT OF APPEALS

DEMURRER OF APPELLEE TO PETITION FOR APPEAL—Filed June 14, 1922

The said Respondent says that the Petition for an Appeal is not sufficient in law, and for all that is stated in said Petition, the order of the District Court is clearly right. The grounds of demurrer relied on are as follows:

(1) Petitioner assigns as the first error that the District Court of the United States for the Western District of Virginia erred in not holding that the bankruptcy of the partnership ipso facto rendered null and void Respondent's judgment against W. L. Becker, Sr., and W. L. Becker, Jr., individually.

Respondent says that the partnership of W. L. Becker & Co., and the Roanoke Provision Co., were separate entities, and that said partnerships were so adjudged to be bankrupt as separate entities, and that the adjudication of these partnerships did not dissolve, nor render null and void Respondent's judgment against the individuals. Nor did the filing of the schedules of the individual assets affect Respondent's judgment.

Respondent sayd that its judgment against W. L. Becker, Sr., and W. L. Becker, Jr., individually was more than four months old when said parties were individually adjudged to be bankrupt.

(2) Respondent says that the Petitioner has neither averred nor proven that W. L. Becker, Sr., and W. L. Becker, Jr., individually, was insolvent at the time the lien of its judgment attached, and that it is essential that Petitioned both allege and prove the insolvency of these parties individually, at the time the judgment attached.

(3) Respondent says that its judgment being against W. L. Becker, Sr., and W. L. Becker, Jr., individually could only be dissolved, or rendered null and void, by these parties being adjudged bankrupts individually within four months from the time the lien of said [fol. 79] judgment attached against them individually, and, then, only where it was alleged and proven that they were insolvent individually. Not all judgments recovered within even four months are dissolved or rendered null and void by bankruptcy, but only such as are alleged and proven to have been recovered when the party was either insolvent, or the party or parties to be benefited thereby had reasonable cause to believe the defendant was insolvent and in contemplation of bankruptcy.

None of the essentials for the disolution of Respondent's judgment exist here.

(4) Respondent says that the petition to have the partnerships of W. L. Becker & Co., and the Roanoke Provision Co., adjudged bankrupts contained a prayer that both the partnerships and the individuals be adjudged bankrupts, but the order entered on said

petition by the Judge of the District, distinctly failed and refused to adjudicate the individuals to be bankrupts.

Petitioner having failed to appeal from such order within ten days cannot now be heard to complain. If Petitioner invokes the aid of said order for his purposes he will not be allowed to extend its operation beyond the limitations fixed thereon by the Judge of the District Court.

Wherefore this Respondent submits that its demurrer should be sustained and that the order of the District Court complained of in the Petition herein should be affirmed.

The Liberty National Bank of Roanoke, Va., By Jas. D. Johnston, Attorney.

STATE OF VIRGINIA,
City of Roanoke, To wit:

[fol. 80] I, M. N. Ronald, a Notary Public in and for the City and State aforesaid, do hereby certify that Jas. D. Johnston, counsel for the Liberty National Bank of Roanoke, Va., has this day personally appeared before me in my city aforesaid and made oath that the foregoing demurrer is well founded in point of law; and I do hereby certify that L. R. Tucker, cashier of said bank, has appeared before me in my city aforesaid and made oath that said demurrer is not interposed for delay.

My commission expires on the 10th day of March, 1925.

Given under my hand this the 13th day of June, 1922.

M. N. Ronald, Notary Public.

June 22, 1922, twenty-five copies of the printed record are filed.

IN U. S. CIRCUIT COURT OF APPEALS

STIPULATION AS TO ADDENDUM TO RECORD—Filed July 10, 1922.

(Memo: This Stipulation is printed on page 16a.)

October 26, 1922, apearance of Jas. A. Bear is entered for the appellant.

IN U. S. CIRCUIT COURT OF APPEALS

ARGUMENT OF CAUSE

November 17, 1922, (November Term, 1922), cause came on to be heard, together with No. 2011, before Woods and Waddill, Circuit Judges, and Rose, District Judge, and is argued by counsel and submitted.

[fol. 81] UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

No. 2016

[Title omitted]

Appeal from the District Court of the United States for the Western District of Virginia, at Roanoke

In Bankruptcy

(Argued December 17, 1922; Decided December 21, 1922)

Before Woods and Waddill, Circuit Judges, and Rose, District Judge

James A. Bear and Harvey B. Apperson (Hall, Wingfield & Apperson on brief) for Appellant, and James D. Johnston for Appellee.

OPINION—Filed December 21, 1922

[fol. 82] WOODS, Circuit Judge:

The vital question to be decided is whether the adjudication in bankruptcy of an insolvent partnership carries into bankruptcy the members of the partnership as individuals.

On August 6, 1920, an involuntary petition in bankruptcy was filed against W. L. Becker and W. L. Becker, Jr., partners trading as W. L. Becker & Company and also as the Roanoke Provision Company, alleging that the partnership was insolvent and that it had executed, on August 4, 1920, a general deed of assignment to a trustee for the benefit of creditors. On August 7 the members of the partnership filed their answer, admitting the allegations of the petition and waiving process. On August 20, 1920, the partnership was adjudged bankrupt. On August 30, 1920, in pursuance of an order of the referee, the partnership filed schedules of its assets and liabilities, and W. L. Becker and W. L. Becker, Jr., filed schedules of their individual assets and liabilities. Two offers of composition were made but the objections thereto were sustained by the District Court.

On April 27, 1921, W. L. Becker and W. L. Becker, Jr., filed their voluntary petitions in bankruptcy as individuals, and on April 28, 1921, were adjudged bankrupts. On May 16, 1921, James A. Bear was elected trustee for the partnership and both individuals.

The Liberty National Bank of Roanoke, in a formal proof of debt in the bankruptcy proceedings of the individuals, claimed a lien on the real estate of the individual partners by virtue of a judgment for $5,666.05 and interest and costs, recovered July 31, 1920, against the partnership, Roanoke Provision Company, and W. L. Becker and W. L. Becker, Jr., as individuals. This judgment was based on a note made by W. L. Becker and the Roanoke Provision Company,

endorsed by W. L. Becker and W. L. Becker, Jr. Partnership assets will not be sufficient to pay partnership debts, and individual assets will not be sufficient to pay individual debts including endorsements of the individuals on partnership notes.

It will be observed that the judgment was recovered less than four months before the petition upon which the adjudication of the firm as a bankrupt was made, but more than four months before the petition upon which the individuals were formally adjudicated. It is [fol. 83] on this ground alone that the Liberty National Bank asserts the validity of the lien of the judgment. The concrete question then is whether the lien of the judgment on individual real estate was displaced by the bankruptcy of the partnership, which occurred less than four months after the date of the lien. And that depends on whether the adjudication of the bankruptcy of the partnership was necessarily an adjudication of the several individuals composing it.

A judgment against the partnership binds its members as individuals and is a lien on the real estate of the individuals composing it. Before the bankruptcy statute, a proceeding instituted in the court of equity to marshal the assets of a partnership on the ground of insolvency required the marshalling of the individual assets and proof of all claims, both partnership and individual. It is impossible for a partnership to be insolvent when the partners individually or any one of them is solvent, because every partner is individually liable for all the debts of a partnership. A proceeding in equity to marshal assets of a partnership would necessarily be dismissed upon a showing that the complaining creditor could collect his debt in an action at law from one of the partners. Under a creditor's bill in a court of equity against a partnership, every creditor of the partnership has the right to prove his claim against the individual members of the firm and have it paid from the individual assets if there be a sufficient surplus over the individual liabilities. Pomeroy Eq. Juris. (4th ed.) Secs. 2371, 2372.

In Francis v. McNeal, 228 U. S. 695, while recognizing the separate entity of the partnership for some purposes, principally for the application of partnership assets to partnership debts, the court held the individual affairs of a partner who had not as an individual been adjudged bankrupt should be administered in the bankruptcy proceedings of the partnership. The court said subsections c, d, e, f and g of section 5 contemplated administration of both partnership and individual estates, except, as provided in subsection h, "in the event of one or more but not all of the members of a partnership being adjudged bankrupt."

Recognizing that insolvency of the partnership connotes insolvency of every member of it, in section 5 from c to g the statute provides, [fol. 84] in case of partnership bankruptcy, for administration of the individual property of the partners as well as the partnership property, and proof and adjustment of individual as well as partnership debts: but since insolvency of the individual partner does not connote insolvency of the partnership, the statute provides that bank-

ruptcy of one or more but not all the partners shall not result in the administration of the partnership affairs in the bankruptcy court.

In discussing 5h in connection with the other clauses of the section, the court in the case cited uses this pregnant language: "But we do not perceive that the clause imports that the partnership could be in bankruptcy, and the partners not." Enforcing this construction the court continues: "On the other hand it would be an anomaly to allow proceedings in bankruptcy against joint debtors from some of whom, at any time before, pending, or after the proceeding, the debt could be collected in full. If such proceedings were allowed it would be a further anomaly not to distribute all the partnership assets. Yet the individual estate after paying private debts is part of those assets so far as needed. Section 5f. Finally, it would be a third incongruity to grant a discharge in such a case from the debt considered as joint but to leave the same persons liable for it considered as several."

There are other practical reasons for holding the bankruptcy of the partnership to carry with it the bankruptcy of the individual partners. Since individual debts and individual property as well as partnership debts and partnership property must be brought into the partnership bankruptcy and the equities of the creditors adjusted, there is nothing left for a separate petition and adjudication of the individuals to act upon. It cannot be that the bankruptcy of the partnership carries the partners into the proceeding with their assets and liabilities for the purpose of proving debts, adjusting equities, preventing preferences generally and distributing to creditors the individual as well as partnership assets, and yet does not carry them in for the two other main purposes of the bankruptcy statute, namely, protecting creditors against the preference of liens acquired within four months of bankruptcy, and discharging the debtor from his debts.

On principle and the reasoning and conclusion of the court in [fol. 85] Francis v. McNeal, we see no escape from the holding that the adjudication of the partnership carries with it all the individuals of the partnership. This conclusion is supported also by the reasoning in Voccaro v. Security Bank, 103 Fed. 436 Euclid National Bank v. Union Trust & Deposit Co., 149 Fed. 975; Francis v. McNeal, 186 Fed. 481; Menke v. Sunderman, 186 Fed. 486; Carter v. Whistler, 275 Fed. 743, 746; Abbott v. Anderson, 265 Ill. 285.

We conclude that an adjudication of the partnership was necessarily an adjudication of the bankruptcy of the individuals composing it, and that in the case presented the lien of a judgment obtained within four months of the filing of the petition against the partnership was lost by the adjudication.

The insolvency of the partnership at the date of the judgment seems to have been assumed in the court below. At any rate, no issue of solvency or insolvency at the date of the judgment appears to have been made. We express no opinion as to the existence of such insolvency or its effect.

The issue of the allowance or rejection of a claim of a lien on the bankrupt property is reviewable in this court only by appeal; and

therefore is decided in this proceeding. In the Matter of Loving, 224 U. S. 183; Soder v. Arts, 213 U. S. 223.

Reversed.

UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

No. 2016

[Title omitted]

[fol. 86] Appeal from the District Court of the United States for the Western District of Virginia

DECREE—Filed and Entered December 22, 1922

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Virginia, and was argued by counsel.

On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the decree of the said District Court, in this cause, be, and the same is hereby, reversed with costs; and that this cause be, and the same is hereby, remanded to the District Court of the United States for the Western District of Virginia, at Roanoke, for further proceedings in accordance with the opinion of this Court.

C. A. Woods, U. S. District Judge. December 22, 1922.

IN U. S. CIRCUIT COURT OF APPEALS

PETITION OF APPELLEE FOR STAY OF MANDATE—Filed January 13, 1923

The Appellee, by its counsel, James D. Johnston, Esq., represents unto the Court that it is its intention to apply to the Supreme Court of the United States for a writ of certiorari to this Court in the above entitled cause, and respectfully asks that the issuance of the mandate [fol. 87] of this Court in the above case be stayed pending its application in the Supreme Court for said writ of certiorari.

Jas. D. Johnston, Counsel for Appellee. January 11th, 1923.

UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

No. 2016

[Title omitted]

Appeal from the District Court of the United States for the Western District of Virginia, at Roanoke

ORDER STAYING MANDATE—Filed January 13, 1923

Upon the application of the Appellee, by its counsel, James D. Johnston, Esq., and for good cause shown,

[fol. 88] It is ordered that the issuance of the mandate of this Court in the above entitled cause be, and the same is hereby, stayed pending the Appellee's application in the Supreme Court of the United States for a writ of certiorari to this Court, provided said application is presented in the said Supreme Court within 30 days from January 22, 1923.

C. A. Woods, U. S. District Judge. January 13, 1923.

UNITED STATES OF AMERICA,
Fourth Circuit, ss:

IN U. S. CIRCUIT COURT OF APPEALS

CLERK'S CERTIFICATE

I, Claude M. Dean, clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the foregoing is a true copy of the entire record and proceedings in the therein entitled causes as the same remain upon the records and files of the said Circuit Court of Appeals.

In testimony whereof, I hereto set my hand and affix the seal of the said United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, this 24th day of January, A. D. 1923.

Claude M. Dean, Clerk U. S. Circuit Court of Appeals, Fourth Circuit. (Seal of United States Circuit Court of Appeals, Fourth Circuit.)

UNITED STATES OF AMERICA,
Fourth Circuit, ss:

[fol. 89] UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

WRIT OF CERTIORARI AND RETURN—Filed June 2, 1923

I, Claude M. Dean, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do make return of the annexed writ of certiorari issued out of the Supreme Court of the United States in the cause therein entitled on the 29th day of March, 1923, by annexing hereto a certified copy of the stipulation of counsel of record, "that the transcript of the record already on file in the Supreme Court of the United States may be taken as the return," the original of which stipulation was filed in my office on this 31st day of May, A. D., 1923.

In testimony whereof, I hereto set my hand and affix the seal of the said Circuit Court of Appeals, at Richmond, Virginia, on this 31st day of May, A. D., 1923.

Claude M. Dean, Clerk U. S. Circuit Court of Appeals, Fourth Circuit. (Seal of United States Circuit Court of Appeals, Fourth Circuit.)

[fol. 90] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1922

No. 889

[Title omitted]

STIPULATION AS TO TRANSCRIPT OF RECORD IN THE SUPREME COURT OF THE UNITED STATES

It is hereby stipulated and agreed between counsel that the transcript of the record already on file in the Supreme Court of the United States may be taken as the return.

Jas. D. Johnston, Attorney for Petitioner; G. A. Winfield, Attorney for Respondent.

UNITED STATES OF AMERICA,
Fourth Circuit, ss:

I, Claude M. Dean, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the foregoing stipulation of Counsel is a true copy of the original filed May 31, 1923, and now remaining among the records and proceedings in the therein entitled cause.

In testimony whereof, I hereto set my hand and affix the seal of the said Circuit Court of Appeals, at Richmond, Virginia, on this 31st day of May, A. D., 1923.

Claude M. Dean, Clerk U. S. Circuit Court of Appeals, Fourth Circuit. (Seal of United States Circuit Court of Appeals, Fourth Circuit.)

[fol. 91] UNITED STATES OF AMERICA, ss:

(Seal of the Supreme Court of the United States.)

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Fourth Circuit, Greeting:

Being informed that there is now pending before you a suit in which James A. Bear, Trustee in Bankruptcy of the Estates of W. L. Becker, Sr., and W. L. Becker, Jr., Partners, Trading as W. L. Becker & Company and as the Roanoke Provision Company, and Trustee in Bankruptcy of the Individual Estates of W. L. Becker, Sr., and W. L. Becker, Jr., Bankrupts, is appellant, and The Liberty National Bank of Roanoke, Virginia, is appellee, No 2016, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the District Court of the United States for the Western District of Virginia, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, Do hereby com-[fol. 92] mand you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the twenty-ninth day of March, in the year of our Lord one thousand nine hundred and twenty-three.

Wm. R. Stansbury, Clerk of the Supreme Court of the United States.

[fol. 93] [File endorsement omitted.]

[fol. 94] [File endorsement omitted.]

In testimony whereof, I hereto set my hand and affix the seal of the said Circuit Court of Appeals, at Richmond, Virginia, on this 31st day of May, A. D., 1923.

Claude M. Dean, Clerk U. S. Circuit Court of Appeals, Fourth Circuit. (Seal of United States Circuit Court of Appeals, Fourth Circuit.)

[fol. 91] UNITED STATES OF AMERICA, ss:

(Seal of the Supreme Court of the United States.)

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Fourth Circuit, Greeting:

Being informed that there is now pending before you a suit in which James A. Bear, Trustee in Bankruptcy of the Estates of W. L. Becker, Sr., and W. L. Becker, Jr., Partners, Trading as W. L. Becker & Company and as the Roanoke Provision Company, and Trustee in Bankruptcy of the Individual Estates of W. L. Becker, Sr., and W. L. Becker, Jr., Bankrupts, is appellant, and The Liberty National Bank of Roanoke, Virginia, is appellee, No 2016, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the District Court of the United States for the Western District of Virginia, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, Do hereby com-[fol. 92] mand you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the twenty-ninth day of March, in the year of our Lord one thousand nine hundred and twenty-three.

Wm. R. Stansbury, Clerk of the Supreme Court of the United States.

[fol. 93] [File endorsement omitted.]

[fol. 94] [File endorsement omitted.]

In testimony whereof, I hereto set my hand and affix the seal of the said Circuit Court of Appeals, at Richmond, Virginia, on this 31st day of May, A. D., 1923.

Claude M. Dean, Clerk U. S. Circuit Court of Appeals, Fourth Circuit. (Seal of United States Circuit Court of Appeals, Fourth Circuit.)

[fol. 91] UNITED STATES OF AMERICA, ss:

(Seal of the Supreme Court of the United States.)

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Fourth Circuit, Greeting:

Being informed that there is now pending before you a suit in which James A. Bear, Trustee in Bankruptcy of the Estates of W. L. Becker, Sr., and W. L. Becker, Jr., Partners, Trading as W. L. Becker & Company and as the Roanoke Provision Company, and Trustee in Bankruptcy of the Individual Estates of W. L. Becker, Sr., and W. L. Becker, Jr., Bankrupts, is appellant, and The Liberty National Bank of Roanoke, Virginia, is appellee, No 2016, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the District Court of the United States for the Western District of Virginia, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, Do hereby com-[fol. 92] mand you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the twenty-ninth day of March, in the year of our Lord one thousand nine hundred and twenty-three.

Wm. R. Stansbury, Clerk of the Supreme Court of the United States.

[fol. 93] [File endorsement omitted.]

[fol. 94] [File endorsement omitted.]